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Supreme Court of the United States

EPILEPSY FOUNDATION OF NORTHEAST OHIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, which protects concerted activity by employees for mutual aid or protection, permits the National Labor Relations Board to create an irrebuttable presumption that all nonunion employees have collective interests entitling them to a co-worker's presence at an investigatory interview.

2. Whether restricting a nonunion employer's communications with an employee solely on the topic of possible misconduct by the employee places an unconstitutional content-based restriction on the employer's free speech rights under the First Amendment.

3. Whether a challenge to an unconstitutional exercise of authority by the National Labor Relations Board may be considered in the first instance by an Article III court.

LIST OF PARTIES

The parties to the proceeding before the United States Court of Appeals for the District of Columbia Circuit were Epilepsy Foundation of Northeast Ohio, an unincorporated association with no parents or subsidiaries that have issued shares to the public, petitioner below (Petitioner herein); and the National Labor Relations Board, respondent below (Respondent herein).

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IN THE

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EPILEPSY FOUNDATION OF NORTHEAST OHIO,
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NATIONAL LABOR RELATIONS BOARD,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Epilepsy Foundation of Northeast Ohio (the "Foundation"), an employer subject to the provisions of the National Labor Relations Act ("NLRA" or the "Act"), 29 U.S.C. §§ 151-169, respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The November 2, 2001 opinion of the United States Court of Appeals for the District of Columbia Circuit is reproduced herein as Appendix A and is reported at 268 F.3d 1095 (D.C. Cir. 2001). The July 10, 2000 decision and order of the National Labor Relations Board ("Board") is reproduced herein as Appendix B and is reported at 331 N.L.R.B. No. 92 (2000).

JURISDICTION

The judgment of the court of appeals was entered on November 2, 2001. In response to Petitioner's application, Chief Justice Rehnquist extended the time for filing a petition for certiorari to and including March 4, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., art. III, § 2:

> The judicial Power shall extend to all Cases . . . arising under this Constitution . . . .

U.S. Const., amend. I:

> Congress shall make no law . . . abridging the freedom of speech . . . .

Section 7 of the NLRA, 29 U.S.C. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

Section 8(a) of the NLRA, 29 U.S.C. § 158(a):

> It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7] . . . .

Section 10(e) of the NLRA, 29 U.S.C. § 160(e):

> No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

STATEMENT OF THE CASE

In this case, the Board, reversing its own precedent, decided that Section 7 of the NLRA provides nonunion employees with the right to have a co-worker present at an investigatory interview. App. 23a-24a. Although Section 7 extends the protections of the NLRA only to those employees who actually "engage in . . . concerted activities for . . . mutual aid or protection," 29 U.S.C. § 157, the Board determined that this right attaches even when the co-worker functions merely as a representative of the individual interests of the employee under investigation. The Board declared that there is an irrebuttable presumption that all employees share an interest in preventing "a practice of unjust punishment." App. 27a. The Foundation is challenging the Board's creation of this presumption of concerted activity on the ground that it conflicts with the express statutory language of Section 7. Moreover, because one effect of the Board's presumption is to restrict an employer's communications with its employees when, and only when, an employer conducts an investigatory interview of an employee, the Foundation is also challenging the Board's unconstitutional restriction of the Foundation's free speech rights.

The Foundation is a charitable, nonprofit organization dedicated to the prevention and control of epilepsy and to assisting persons in confronting the challenges presented by this disorder. The Foundation is one of the seventy-two dues paying affiliates of the Epilepsy Foundation of America. The Foundation's employees are not represented by a labor organization. App. 96a-97a.

One of the Foundation's programs was a research project assisting teenagers with epilepsy in making the transition from school to work. Arnis Borgs worked on the project as an employment specialist. His supervisor was Richard Berger. App. 20a.

On January 17, 1996, Borgs and another employee sent a memorandum to Berger asserting that Berger's supervision was no longer desired or needed. A copy of this memorandum was sent to the Foundation's Executive Director, Christine Loehrke. App. 20a-21a. As the court of appeals concluded, the memorandum expressed a refusal to recognize Berger's supervisory authority. App. 15a-16a.

On February 1, Loehrke directed Borgs to meet with her and Berger. One purpose of the meeting was for Loehrke to talk to Borgs about the January 17 memorandum. Borgs refused to meet with Loehrke and Berger alone, and asked if another employee could attend the meeting. Loehrke denied this request. After Borgs repeatedly refused to meet with Loehrke and Berger, the Foundation terminated him for insubordination. App. 21a-22a.

The Board's Regional Director issued an unfair labor practice complaint alleging, *inter alia*, that the Foundation violated Section 8(a)(1) of the Act by discharging Borgs for engaging in concerted activity, and a hearing was held before an administrative law judge ("ALJ").[1] The ALJ concluded that the discharge was lawful because, under then-prevailing Board law, Borgs had no right to insist on having a co-worker present at an investigatory interview. App. 115a.

The Board's General Counsel excepted to this finding. Upon review of the ALJ's decision by the Board, a three-to-two majority of the Board abruptly decided to depart from Board precedent. The majority concluded that Section 7 of the Act provides nonunion employees with the right to have a co-worker present at an investigatory interview. App. 23a-24a. Applying this newly announced rule retroactively,

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[1] The other allegations in the unfair labor practice complaint, including allegations relating to the discharge of Ashraful Hasan, are not relevant to the questions presented by this Petition.

the Board concluded that the Foundation had violated Section 8(a)(1) by discharging Borgs for engaging in protected concerted activity. App. 31a-32a.

In deciding to limit a nonunion employer's communications with its employees solely with respect to investigatory interviews, the Board chose not to explain "why nonunionized employees should be entitled to the presence of a coworker at an investigatory interview when nonunionized employees are not entitled to the presence of a coworker at meetings to discuss other issues." App. 27a n.11. The Board did, however, observe "that the principles set forth in the Supreme Court's *Weingarten* decision [*NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975)], speak only to this specific right." *Id.*[2]

The Foundation petitioned the U.S. Court of Appeals for the District of Columbia Circuit for a review of the Board's decision.[3] The court of appeals concluded that the Board's rule should not be applied retroactively, and, therefore, the Foundation's decision to discharge Borgs could not be held unlawful. App. 3a, 12a-13a. However, the court upheld the Board's new rule, providing nonunion employees with the right to a co-worker representative at an investigatory interview. The court found the "Board's new interpretation [of Section 7] reasonable under the Act." App. 3a. With respect to the Foundation's challenge to the constitutionality of the Board's decision, on the ground that it violates employers' free speech rights, the court declined to rule on this question,

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[2] As discussed in more detail below, in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), this Court held that in a union workplace an employee does possess the right under Section 7 to have a union representative at an investigatory interview because this representative protects "the interests of the entire bargaining unit." *Id.* at 260.

[3] The court of appeals had jurisdiction pursuant to 29 U.S.C. §§ 160(e)-(f).

deciding that the Foundation was precluded from presenting this challenge as it had not previously petitioned the Board for a rehearing on this basis. App. 11a-12a.

Although the court of appeals relieved the Foundation of any back pay liability for the discharge of Borgs, the Foundation continues to have employees. Therefore, the Foundation, along with all other nonunion employers, is adversely affected by the Board's new rule, which materially impairs the Foundation's ability to conduct workplace investigations and to communicate freely with its employees.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE AN IMPORTANT QUESTION OF FEDERAL STATUTORY CONSTRUCTION THAT HAS DIVIDED THE APPELLATE COURTS

The issue of whether nonunion employees enjoy the right to have a co-worker representative present at an investigatory interview is an important and recurring one. It is no exaggeration to say that the Board's new rule will radically transform the manner in which nonunion employers carry out workplace investigations. Such investigations are an everyday occurrence, especially in an era when employers are required to investigate employee complaints of discriminatory harassment. *See Farragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998). Moreover, this is an issue that cuts across all industries subject to the Board's jurisdiction, affecting on an ongoing basis literally tens of millions of nonunion employees and hundreds of thousands of nonunion employers.[4] Furthermore, this is an issue on which the Board

[4] Congress has delegated to the Board the full limits of its own jurisdiction. *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643 (1944). The overwhelming majority of this nation's workers, approximately eighty-five percent, are not represented by a union. U.S. Census Bureau, *Statistical Abstract of the United States* 411 (2001).

itself has changed course four times in two decades, resulting in conflicting interpretations of Section 7 of the NLRA by the appellate courts. This Court's review of this issue is warranted to resolve this conflict as well as to determine the scope of Section 7, a question of "utmost importance in the administration of the Act." Robert A. Gorman, *Basic Text on Labor Law* 296 (1976).

A. The Board's Vacillation; Conflict Among the Appellate Courts

In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), this Court held that Section 7 of the NLRA can be interpreted to provide an employee *in a bargaining unit* the right "to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline." *Id.* at 256. In upholding this interpretation of Section 7, the Court specifically relied on the fact that in a bargaining unit employees have a *collective* interest. Therefore, even if only the employee being investigated has "an immediate stake in the outcome," the right to the presence of a union representative can be derived from the Section 7 right of employees to engage in concerted activities for mutual aid or protection: "The union representative whose participation [the employee] seeks is . . . safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit." *Id.* at 260.

Seven years later, in *Materials Research Corp.*, 262 N.L.R.B. 1010 (1982), the Board stretched the holding in *Weingarten* to apply it to nonunion employees, disregarding this Court's express predication of its holding on the collective interests possessed by employees in a bargaining unit. Indeed, the Board concluded that Section 7 compels the extension of *Weingarten* rights to nonunion employees. 262 N.L.R.B. at 1014.

Almost immediately, there was vigorous disagreement among the appellate courts about the Board's authority to enlarge the scope of Section 7. The Ninth Circuit rejected the Board's new rule, while the Third Circuit embraced it.

In rejecting the *Materials Research* rule, the Ninth Circuit observed that the *Weingarten* Court had found a "concertedness inherent in union activity," whereas in a nonunion setting there may be "no evidence of concert" between employees at the time a request for a co-worker representative is made. *E. I. du Pont de Nemours and Co. v. NLRB*, 707 F.2d 1076, 1078 (9th Cir. 1983). The Board's *Materials Research* rule was using the "possibility of concerted activity" arising out of co-worker presence at an investigatory interview to endow the act of co-worker representation in a nonunion setting with Section 7 protection. The Ninth Circuit correctly concluded that the Board cannot broaden the scope of Section 7 activity by redefining it to encompass all conduct that under favorable circumstances *might* lead to group action. Accordingly, the Ninth Circuit unambiguously held that the Board's "interpretation is inconsistent with the language of the NLRA and we reject it." *Id.* at 1079.

Soon thereafter, the Third Circuit approved the Board's *Materials Research* rule, explicitly rejecting the Ninth Circuit's reasoning. *E. I. du Pont de Nemours & Co. v. NLRB*, 724 F.2d 1061, 1066 (3d Cir. 1983). However, the Board, experiencing second thoughts about the wisdom of *Materials Research*, then moved the Third Circuit to vacate its opinion. *E. I. du Pont de Nemours & Co. v. NLRB*, 733 F.2d 296 (3d Cir. 1984). Pursuant to the Board's motion, the court did vacate its opinion, remanding the case to the Board. Significantly, one reason the Third Circuit granted the motion to vacate was to avoid a conflict with the Ninth Circuit: "Since our previous opinion enforcing the Board arguably conflicted with the Ninth Circuit's decision . . . the Supreme Court might have been impelled to grant certiorari in order to announce uniform law on the subject." 733 F.3d at 298 n.2.

Following remand, the Board executed a complete about-face, concluding that extension of *Weingarten* rights to nonunion employees is precluded by the NLRA. This rule was announced in a case unrelated to the proceeding remanded by the Third Circuit, namely *Sears, Roebuck & Co.*, 274 N.L.R.B. 230 (1985).[5] The Board explained that *Weingarten* rights "in a unionized setting [are] wholly consistent with established principles of labor management relations" given the union's "authority to represent unit employees," while there is no statutory basis for extending the same rights to employees who have decided not to have a collective bargaining representative. *Id.*

The Board's *Sears, Roebuck* rule did not find favor in the Third Circuit. That court reasoned that Section 7 could not be interpreted to exclude *Weingarten* rights for nonunion employees, and directed the Board to reconsider its decision. *Slaughter v. NLRB*, 794 F.2d 120, 128 (3d Cir. 1986).

Following this second remand from the Third Circuit, the Board modified its rationale for not extending *Weingarten* rights to nonunion employees, concluding that although it was permissible under the Act to do so, it "best effectuate[d] the purposes of the Act" to confine *Weingarten* rights to the union workplace. *E. I. du Pont de Nemours & Co.*, 289 N.L.R.B. 627, 631 (1988). The Third Circuit enforced this decision. *Slaughter v. NLRB*, 876 F.2d 11 (3d Cir. 1989).

There matters stood until the Board's decision in the instant proceeding. In deciding once again to grant nonunion employees the right to have a co-worker present during an investigatory interview, the Board's three-to-two majority explained that Section 7 protects the right of both union and nonunion employees "to act in concert for mutual aid or protection" and "the right to have a co-worker present at the

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[5] The *Sears, Roebuck* decision briefly discusses the complicated history of the Third Circuit proceeding. 274 N.L.R.B. at 230 n.4.

investigatory interview affords unrepresented employees the opportunity to act in concert to prevent a practice of unjust punishment." App. 27a.

In enforcing the Board's decision, the court below accepted the Board's interpretation of Section 7 as protecting activity that *could* lead to concerted activity because the employees *might* discover a common interest: "The Board's position . . . recognizes that even nonunion employees *may* have a shared interest in preventing the imposition of unjust punishment." App. 8a (emphasis added). The D.C. Circuit has thus aligned itself with the Third Circuit in direct opposition to the Ninth Circuit which, as indicated, has held that Section 7 protects actual concerted activity, not the "possibility of concerted activity." *E. I. du Pont de Nemours and Co.*, 707 F.2d at 1079.

B. The Significance of the Board's Misinterpretation of Section 7

In its opinion below, the D.C. Circuit appeared to minimize the significance of the Board's vacillating, on-again, off-again extension of *Weingarten* rights to the nonunion workplace. The court of appeals shrugged and said, "It is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board." App. 3a.

With due respect to the court of appeals, Section 7 of the Act is not a political football that can be tossed back and forth whimsically between Boards whose varying composition may reflect the changing fortunes of the Democratic and Republican parties. Section 7 is the core provision of a statute which governs the conduct of this nation's employers and employees. Conduct within the scope of Section 7 is protected from employer interference; conduct outside the scope of Section 7 is not. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 531-32 (1992). It is of paramount importance to

have a stable, definitive understanding of Section 7. The Board has a responsibility to interpret and enforce the law, not to create lore.

The need to end the confusion caused by the Board's repeated reexamination of this issue by itself justifies this Court's review. Moreover, it is apparent that the Board's current interpretation of Section 7 cannot be reconciled with the plain language of the statute.

An employee seeking to protect his own individual interests is not, and cannot be, engaged in "concerted activities for . . . mutual aid or protection." *NLRB v. Portland Airport Limousine Co.*, 163 F.3d 662, 664-67 (1st Cir. 1998) (discussing relevant case law interpreting Section 7). Admittedly, actions by an individual employee can sometimes merit Section 7 protection, but only if there is a direct link to group action, such as when an individual employee acts as a spokesperson for the complaints of others or the individual employee is invoking a right previously obtained through collective action. *See NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 831 (1984) (single employee's invocation of rights found in collective bargaining agreement considered concerted activity). On such occasions, the employee may be acting alone, but he is advancing group, not individual, interests.

In deciding that *all* nonunion employees have the right to a co-worker's presence at investigatory interviews regardless of whether the employees have previously manifested shared interests, the Board majority based its decision on an irrebuttable presumption that all employees must have shared interests whether they realize it or not. The Board utilizes this presumption of shared interests to create the requisite linkage to group interests, speculating that representation of an individual employee's interests at an investigatory interview must somehow further the interests of other employees.

However, the Board's presumption of shared interests conflicts with cornerstone principles of the Act as well as the *realities of the workplace.*

The NLRA creates no presumption, and it does not authorize the Board to create a presumption, that all employees of all employers have collective interests. Quite to the contrary, the Act expressly adopts the principle of freedom of choice, leaving it up to employees to decide whether they have shared interests that require them to organize into a union or engage in other collective activity. As this Court has recognized, under the NLRA a "workman is free [to] value[] his own bargaining position more than that of the group." *J. I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944). Although the NLRA instituted procedures whereby employees so inclined can engage in common action, it does not dictate to employees they must act as a group vis-a-vis their employer. Thus, unless and until employees declare they have shared interests, the only inference permissible under the Act is that they retain their own individual interests.

Furthermore, consideration of workplace realities confirms that in the setting of many investigatory interviews, only the interests of the individual employee will be at stake. Employees are often investigated for misconduct, such as drug abuse, in which other employees will have no interest. Employees are also many times investigated for misconduct that is not only inimical to the interests of other employees, but may be expressly repudiated by them. For example, employers must investigate allegations of sexual or racial harassment made by employees against their co-workers. *See Farragher*, 524 U.S. at 806 (employer covered by Title VII has duty to prevent sexual harassment by appropriate response to complaints of harassment).

Weingarten is not to the contrary. Indeed, the Court expressly recognized that in many workplace investigations only the individual employee will have "an immediate stake

in the outcome." 420 U.S. at 260. However, in a union workplace, the employees have antecedently decided that they have common interests in establishing uniform policies and procedures relating to discipline, and the union representative is present at the interview to safeguard these "interests of the entire bargaining unit" not just "the particular employee's interest." *Id.* The Board decision inexplicably ignores this key distinction between union and nonunion workplaces. [6]

The Board conjectures that having a co-worker present at an investigatory interview could lead to a practice of mutual assistance because the co-worker's presence "greatly enhances the employees' opportunities to act in concert." App. 26a. This reasoning is dangerously unsound. To begin, Section 7 protects employees who actually engage in concerted activities; the Act does not force employers to provide "opportunities" for employees to ponder the benefits of collective action. Moreover, as the Ninth Circuit concluded in rejecting the Board's earlier attempt to extend *Weingarten* rights to nonunion employees, a "possibility of concerted activity" that is "wholly speculative" provides too attenuated a link with actual group activity to trigger Section 7 coverage. *E. I. du Pont de Nemours and Co.*, 707 F.2d at 1079 (rejecting application of Board's *Materials Research* rule). Although a pattern of mutual assistance could arise as a result of a co-worker's representation, it could also happen that no such pattern will emerge and that employees will continue to

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[6] Further revealing that the Board has not thought through the implications of its decision, the Board did not address the situation in which an employee being investigated cannot persuade another employee to act as a representative. Does the employee "lose" his statutory right in such a situation? Or is it the Board's position that this statutory right is contingent on the popularity or persuasive power of the employee? Such a situation could not, of course, arise in a unionized context because unions have a duty to represent all employees in the bargaining unit fairly. *Vaca v. Sipes*, 386 U.S. 171 (1967).

prefer to deal with their employer as individuals. Indeed, it could also happen that having a co-worker representative at an employee's interview will result in the abandonment of incipient group activity. An employee may resent the presence of a co-worker at the interview of another employee being investigated for offensive or divisive conduct (for example, racial harassment) and will put an end to his previous efforts to join forces with the co-worker in areas of mutual concern. All of these outcomes are possible: a neutral effect on group activity, a positive effect on group activity and a negative effect on group activity. But the Board cannot broaden the scope of Section 7 by redefining it to encompass all conduct that under favorable circumstances *might* lead to group action. In that case, anything said or done by an individual employee would constitute Section 7 activity because one could always imagine some circumstances in which the individual might induce group action through his conduct.

Taken to its logical conclusion, the reasoning the Board uses to defend its decision would effectively eliminate the statutory requirement that an employee's actions constitute concerted activity for mutual aid or protection in order to qualify for Section 7 coverage. The Board's own reasoning thus reveals its decision to be fundamentally inconsistent with the Act.

The troubling implications of the Board's reasoning, combined with the significant effect the Board's decision will have on millions of nonunion workers and employers, the conflict among the appellate courts and the Board's own twenty-year internal struggle with this issue, indicate that review by this Court is warranted to resolve this important statutory question.

II. THIS COURT SHOULD DETERMINE WHETHER THE BOARD CAN CONSTITUTIONALLY PLACE A CONTENT-BASED RESTRICTION ON EMPLOYER COMMUNICATIONS

Employers have free speech rights. *E.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (freedom to speak "does not depend on the identity of its source, whether corporation, association, union or individual"). These rights must be balanced against, but are not abrogated by, the rights the NLRA provides to employees. In fact, Section 8(c) of the Act expressly incorporates the protections of the First Amendment into the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). As a result, "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *Id.*

An employer's right to speak freely with an employee encompasses any "matters of mutual interest concerning the employment relationship," provided the employer's speech is not coercive or otherwise illegal. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 218 (1959). Moreover, the employer's free speech rights are not restricted to statements without any interrogative content, but embrace questions as well. *See Allentown Mack Sales and Serv., Inc. v. NLRB*, 522 U.S. 359, 386-87 (1998) (Rehnquist, C.J., concurring) (First Amendment protection extends equally to the right to receive information and the right to solicit information); *see generally Edenfield v. Fane*, 507 U.S. 761, 765-66 (1993) (soliciting of information protected by First Amendment). Therefore, an employer's questioning of an employee regarding possible misconduct enjoys at least as much protection as an employer's speech to employees expressing the view that union representation is not in the best interest of employees. *See, e.g., NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469,

477-80 (1941) (employer's noncoercive statements expressing views "on labor policies and problems" protected by First Amendment).

In holding that a nonunion employer may not talk to an employee without a representative of the employee being present when, and only when, the focus of their discussion is an investigation of possible misconduct by the employee, the Board has placed a significant restriction on employer speech. *Cf. Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974) (government restrains speech by conditioning newspaper's right to discuss certain topics on granting political candidates right to reply; one effect of restriction will be to cause newspapers to avoid these topics). Moreover, this restriction is unquestionably a content-based restriction, as the Board has acknowledged that "nonunionized employees are not entitled to the presence of a co-worker at meetings to discuss other issues." App. 27a n.11. Consequently, the Board's restriction is invalid unless it serves a compelling state interest. *See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537, 540 (1980) (Constitution is hostile to content-based regulation and such a regulation as applied to private persons must be precisely drawn and serve a compelling state interest).

The Board did not explicitly offer any justification, let alone a compelling justification, for its abridgment of an employer's free speech rights. Furthermore, no plausible justification could be forthcoming. The Board might claim that speaking with an employee about possible misconduct without a representative present "coerces" the employee, but, leaving aside other problems with such a contention, the Board does not explain why a discussion of discipline under those circumstances is coercive, whereas a one-on-one discussion of wages, promotions, work schedules, etc., is not. Many employees will feel more threatened by a discussion that might lead to a denial of a promotion, a reduction in

wages or a transfer to Alaska than they will about a discussion that might result in a disciplinary counseling. The Board cannot, consistent with the First Amendment, simply select topics that it views as especially sensitive and single those out for special treatment.

The Board's decision to restrict employer speech solely on the topic of employee misconduct appears to have no justification other than the fact that "the Supreme Court's *Weingarten* decision speaks only to this specific right." App. 27a n.11. But *Weingarten*, of course, did not address the issue of employer discussions of misconduct in a nonunion workplace. Here again, the Board has blithely ignored the distinctions between a union and nonunion workplace, which are critical for determining the proper balance between an employer's free speech rights and employees' rights under the Act. "The central purpose of [the Act's] provisions was to protect employee self-organization and the process of collective bargaining from disruptive interferences by employers." *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965). When a unionized employer conducts an investigatory interview of an employee without honoring that employee's request for the presence of a union representative, the employer is arguably both undermining the employee's previous choice of a collective bargaining representative and preventing that representative from protecting the interests of all employees in the bargaining unit. Such action can plausibly be described as illegal interference with employees' rights under the Act. The same cannot be said for a nonunion workplace in which employees may never have expressed any interest whatsoever in self-organization and collective representation.

This Court has stated that "[a]ny assessment of the precise scope of employer expression . . . must be made in the context of its labor relations setting." *Gissel Packing*, 395 U.S. at 617. Despite this admonishment, the Board has utterly failed to consider the differences between union and

nonunion workplaces in deciding that no employer can discuss possible misconduct with employees without the presence of a requested representative.

The Board's ruling raises important constitutional concerns, and, therefore, should be reviewed by this Court.

III. THIS COURT SHOULD DETERMINE WHETHER SECTION 10(e) OF THE NLRA CAN PRECLUDE AN ARTICLE III COURT FROM REVIEWING A CONSTITUTIONAL QUESTION NOT RAISED BEFORE THE BOARD

The court of appeals declined to consider the Foundation's constitutional argument, concluding that Section 10(e) of the Act, 29 U.S.C. § 160(e), required the Foundation to present this challenge to the Board in the first instance. App. 11a-12a. Section 10(e), the judicial review provision of the Act, states, in pertinent part, that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

This Court has concluded that Section 10(e) does bar parties from challenging the Board's factual findings or, in ordinary circumstances, the Board's statutory interpretations unless these challenges are presented in the first instance to the Board. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). However, the Court has never definitively resolved the question of whether Section 10(e) precludes a party from presenting a constitutional challenge to the reviewing court that it did not raise with the Board. *Compare NLRB v. Cheney California Lumber Co.*, 327 U.S. 385, 388 (1946) (Section 10(e) does not bar review when "the Board has patently traveled outside the orbit of its authority") *and NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937) (upon review of a Board order "all questions of constitutional right or statutory authority, are open to

examination by the court") *with International Ladies' Garment Workers Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) ("procedural due process" argument not raised before Board not considered by court).[7] *See also Local 900, Int'l Union of Elec., Radio and Mach. Workers v. NLRB*, 727 F.2d 1184, 1191 n.5 (D.C. Cir. 1984) ("A court can always invalidate Board action that is patently beyond the Board's jurisdiction, even if the jurisdictional challenge was never presented to the Board.") (citing *Cheney California Lumber*). Accordingly, this case provides an opportunity for this Court to consider a heretofore unresolved constitutional issue with far-reaching implications for administration of the Act.

Although this precise question has not been resolved by this Court, fundamental principles of judicial review, along with relevant prior decisions of this Court, strongly suggest that Section 10(e) cannot, consistent with Article III of the Constitution, preclude a court from considering in the first instance a constitutional challenge to the Board's exercise of its authority.

Congress is not obliged under the Constitution to create lower federal courts, but once Congress has done so, it is, at the least, questionable whether Congress can exempt a class of constitutional claims from judicial review. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (serious constitutional

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[7] It is not apparent that the "due process" claim foreclosed in *Garment Workers* was a constitutional claim. The brief filed by the employer did not invoke any specific constitutional provision, but rather advanced nebulous claims about violations of "elemental concepts of procedural due process." Brief of Quality Mfg. Co. at 25, *Garment Workers* (No. 73-765). The courts have distinguished between constitutional due process challenges and due process claims based on "mere procedural errors." *Gilbert v. National Trans. Safety Bd.*, 80 F.3d 364, 367 (9th Cir. 1996). Nonetheless, out of abundance of caution, the Foundation believes it is appropriate to draw the Court's attention to the footnote in *Garment Workers*.

questions "would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim"). *But see Webster*, 486 U.S. at 611 (Congress' "power not to create any lower federal courts at all includes the power to invest them with less than all of the judicial power.") (Scalia, J., dissenting). Indeed, this Court has observed that it is a "well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed." *Califano v. Sanders*, 430 U.S. 99, 109 (1977). Moreover, this Court has recognized on other occasions that constitutional challenges to an administrative agency's exercise of its authority can and should be resolved by Article III courts even if the agency itself has not considered these challenges. *Matthews v. Eldridge,* 424 U.S. 319, 329 n.10 (1976) (failure to raise constitutional claim before agency "would not bar [party] from asserting it later"). With respect to constitutional challenges, administrative exhaustion may not even be required. *Weinberger v. Salfi,* 422 U.S. 749, 765-67 (1975) (full exhaustion of internal review procedures not necessary where only issue remaining is the constitutionality of a statutory requirement); *see also Gilbert v. National Transp. Safety Bd.*, 80 F.3d 364, 367 (9th Cir. 1996) (court "may consider constitutional claims, regardless of whether the petitioner presented the claims" to the agency).

Furthermore, examination of the underlying purposes of Section 10(e) shows that this provision should not be interpreted to bar judicial consideration of constitutional claims. Section 10(e) aims to avoid repetitive appeals by ensuring that the Board can bring its labor relations expertise to bear on an issue before the appellate court reviews its determination. *See Local 900, Int'l Union of Elec., Radio and Mach. Worker,* 727 F.2d at 1191. Constitutional challenges, by contrast, present pure issues of law which may be resolved by the courts without any additional factual development and with respect to which the courts have more expertise than the Board.

The Constitution limits the Board's authority. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499 (1979). In this proceeding, the Board, by expansively interpreting the scope of Section 7 and creating a content-based barrier to communications between nonunion employers and employees, has transcended those constitutional limits. This Court should decide whether Section 10(e) of the Act can bar an Article III court from considering in the first instance a claim that "the Board has patently traveled outside the orbit of its authority," *Cheney California Lumber*, 327 U.S. at 388, by unconstitutionally restricting employer speech.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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March 4, 2002

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 00-1332

EPILEPSY FOUNDATION OF NORTHEAST OHIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Review* and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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Argued Oct. 2, 2001
Decided Nov. 2, 2001

Before: EDWARDS, ROGERS, and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* HARRY T. EDWARDS.

HARRY T. EDWARDS, *Circuit Judge*:

Petitioner, the Epilepsy Foundation of Northeast Ohio ("the Foundation"), challenges a National Labor Relations Board ("NLRB" or "Board") decision finding that the Foundation committed unfair labor practices when it discharged Ashraful Hasan and Arnis Borgs in violation of § 8(a)(1) of the National Labor Relations Act ("NLRA" or "Act"). In

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* Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

reaching this result, the NLRB first interpreted § 7 of the Act to extend the rule of *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975), to nonunion workplaces. The Board then applied the new rule retroactively in holding the Foundation liable for Borgs' discharge. *Epilepsy Found of Northeast Ohio*, 331 N.L.R.B. No. 92, at 1, 2000 WL 967066 (July 10, 2000) ("*Board Decision*"). The NLRB also found that the Foundation committed an unfair labor practice in firing Hasan for engaging in protected concerted activity.

In *Weingarten*, the Supreme Court held that employees in a unionized workplace may request the presence of a union representative at an investigatory interview which the employee reasonably believes might result in disciplinary action. 420 U.S. at 256, 95 S.Ct. 959. In 1982, in *Materials Research Corp.*, 262 N.L.R.B. 1010, 1982 WL 24684 (1982), the Board extended the *Weingarten* rule to cover employees in nonunion workplaces, holding that such employees have a right to request the presence of a coworker in an investigatory interview which the employee reasonably believes could result in disciplinary action. This holding was premised on the assumption that an employee's right to assistance emanates from § 7 of the NLRA, rather than from a union's right of representation under § 9. The Board reversed itself in *Sears, Roebuck & Co.*, 274 N.L.R.B. 230, 1985 WL 45768 (1985), holding that *Weingarten* principles do not apply in circumstances where there is no certified or recognized union. Three years later, in *E.I. Dupont De Nemours*, 289 N.L.R.B. 627, 628, 1988 WL 213789 (1988), the Board adhered to the rule enunciated in *Sears,* but acknowledged that "the statute might be amenable to other interpretations." In this case, the Board has come full circle, reimposing the holding of *Materials Research.*

The Foundation claims that the holding in this case is unlawful because it cannot be squared with *Weingarten.* We disagree. The Court's decision in *Weingarten* did not deal with

an employee's request for coworker representation in a nonunion setting, and the Board's decision in this case is a reasonable reading of § 7 of the NLRA. An otherwise reasonable interpretation of § 7 is not made legally infirm because the Board gives *renewed,* rather than new, meaning to a disputed statutory provision. It is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board. Because the Board's new interpretation is reasonable under the Act, it is entitled to deference. *See United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001).

The Board erred, however, in giving retroactive application to its current interpretation of § 7. Employees and employers alike must be able to rely on clear statements of the law by the NLRB. Because, at the time of Borgs' scheduled interview, employees in nonunion workplaces possessed no right to have a coworker present, the Foundation's decision to discharge Borgs for refusing to meet alone with his supervisors was not unlawful under the NLRA. We also reject the Board's determination that the Foundation committed an unfair labor practice when it discharged Hasan for purported protected concerted conduct. The Board's judgment on Hasan is not supported by substantial evidence and it is based on an erroneous application of established law. Hasan was discharged for unprotected, insubordinate behavior.

I. BACKGROUND

Arnis Borgs and Ashraful Hasan worked as a transition assistant and a transition specialist, respectively, for the Foundation and were both supervised by Rick Berger. After some disagreements with Berger, Borgs and Hasan sent a memorandum to Berger on January 17, 1996 stating:

> As mentioned during earlier discussions (albeit brief) with you, both Dr. Ashraful Hasan and Mr. Arnis Borgs reiterate that your supervision of the program operations performed by them is not required.

> Your input to the NIDRR project in the past is appreciated. At this stage, the major area which has to be addressed—deals with outreach. Only support staff assistance is needed in this regard.

Exhibit GC-12, *reprinted in Board Decision*, at 1 n.4. On January 29, 1996, Borgs and Hasan sent a lengthier memorandum to Christine Loehrke, Berger's supervisor, outlining several complaints about Berger's supervision and identifying occasions when Berger acted, in their opinion, inappropriately and unprofessionally. *See* Exhibit GC-13, *reprinted in* Joint Appendix ("J.A.") 209.

Berger then requested to meet individually with Borgs and Hasan. After airing several different proposals, Borgs asked for Hasan to attend a meeting at which he, Berger, and Loehrke were scheduled to attend. Loehrke denied Borgs' request to have Hasan attend the meeting. When Borgs refused to meet without Hasan, Loehrke told him to go home for the day and return the next morning. Borgs returned to work the next day and was fired by Loehrke for refusing to meet with his supervisors. *Board Decision*, at 1-2.

Hasan, unlike Borgs, met with Berger and Loehrke on February 1. At this meeting, Loehrke told Hasan that the memo of January 17 was inappropriate. After the meeting, Hasan received a warning notice from Loehrke stating that Hasan's involvement with the January 17 memo was "gross insubordination" and that any further acts of misconduct or insubordination would result in Hasan's immediate discharge. Loehrke and Hasan met again on February 2 to review the January 29 memo. Subsequently, in March, Hasan refused to sign performance objectives given to him by Berger. On March 25, Hasan was summoned to Loehrke's office and told that he was being discharged. The Administrative Law Judge's ("ALJ") decision notes that,

> [o]n March 29, when he returned to pick up his belongings, [Hasan] was given a letter signed by Loehrke

> stating that he was terminated for his conduct over the previous nine months, including, refusal to accept supervision on the NIDRR project and various confrontations with staff members. Loehrke testified that Hasan was terminated because he refused to sign a statement of personal project objectives given him by Berger, that his refusal was done "willingly" and "defiantly," that it constituted gross insubordination and subjected him to discharge. The Respondent's brief confirms that the reason Hasan was terminated was his refusal to sign the performance objectives.

Id. at 29.

The ALJ determined that because "current Board law" did not extend *Weingarten* rights to nonunion employees, the Foundation's discharge of Borgs did not violate § 8(a)(1). *Id.* at 30. The ALJ likewise held that Hasan's termination was not a violation of the Act because "there was no nexus between Hasan's discharge and protected activity on his part." *Id.* at 31.

The NLRB, by a 3-to-2 vote, reversed the ALJ's finding in part and extended the *Weingarten* rule to nonunion workers. The Board applied this extension retroactively to Borgs' conduct, held that Borgs' request to have a coworker attend the meeting with the supervisor was therefore protected activity, and that the Foundation discharged Borgs for engaging in protected activity in violation of the Act. *Id.* at 4-5. The NLRB, by the same 3-to-2 vote, held that the January 17 and January 29 memoranda were "inextricably intertwined," that both memoranda "related to [Borgs' and Hasan's] conditions of employment," that Hasan was punished for engaging in protected activity, and that the Foundation did not demonstrate that they would have fired Hasan even in the absence of this protected activity. *Id.* at 6-7. The Foundation

then petitioned this court for review of the findings of violations on these unfair labor practice charges, and the Board cross-petitioned for enforcement.

II. ANALYSIS

This court must affirm the NLRB's findings of fact if "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e), (f) (1994). And this court must affirm the NLRB's interpretation of the Act "unless it conflicts with the unambiguously expressed intent of the Congress or is otherwise not a permissible construction of the statute." *Yukon-Kuskokwim Health Corp. v. NLRB,* 234 F.3d 714, 716 (D.C.Cir.2000) (quotations omitted).

A. The Weingarten *rule*

The Supreme Court in *Weingarten* held that the NLRB's determination that "§ 7 creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline" was "at least permissible under" the Act. 420 U.S. at 256, 266-67, 95 S.Ct. 959. Both union and nonunion employees fall under the protections of § 7 of the Act, *see NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed.2d 298 (1962); however, because *Weingarten* involved a unionized workplace, the Court did not address whether the right extended to workers in nonunion workplaces.

In the years since the Court's decision in *Weingarten,* the Board has changed its position several times in considering whether employees in nonunion workplaces may invoke the *Weingarten* right. In 1982, in *Materials Research*, 262 N.L.R.B. 1010, the Board relied on § 7 of the NLRA and explicitly extended the *Weingarten* rule to a nonunion workplace. The Board held that "the rationale enunciated in *Weingarten* compels the conclusion that unrepresented employees are entitled to the presence of a coworker at an investigatory interview." *Id.* at 1014.

Three years later, in *Sears, Roebuck*, 274 N.L.R.B. at 230 n. 5, 232, the NLRB reversed course completely, holding that the Act "compels" the conclusion that *Weingarten* "applies only to unionized employees." In 1988, in *E.I. DuPont*, 289 N.L.R.B. at 628, the Board once again modified its position, holding that the decision in *Materials Research* extending *Weingarten* to nonunion workers "represented a permissible construction of the Act, but not the only permissible construction." However, the Board decision in *DuPont* declined to adopt the broad but permissible interpretation, instead holding that *Weingarten* does not extend to "an employee in a nonunionized workplace." *Id.* at 628. Finally, in the case at hand, the NLRB "overrule[d]" *DuPont,* because it is "inconsistent with the rationale articulated in the Supreme Court's *Weingarten* decision, and with the purposes of the Act." *Board Decision*, at 2.

On appeal, the Foundation argues that the Board's decision regarding *Weingarten* rests on an impermissible interpretation of the Act. The Foundation's claim is based on three arguments. First, the presence of a coworker in an investigatory interview is neither "concerted" nor "for mutual aid and protection" and, therefore, it is not within the ambit of § 7. Second, the application of *Weingarten* in the nonunion workplace is at odds with § 9(a) of the Act, which provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by a majority of the employees in [an appropriate bargaining unit] shall be the exclusive representatives of all the employees in such unit." 29 U.S.C. § 159(a). Third, the *Weingarten* rule violates the First Amendment rights of nonunion employers to speak individually with their employees. The Foundation advances two additional claims: first, that the interviews at issue in this case were not "investigatory interviews" as defined by *Weingarten*; and, second, that the Board's departure from precedent has not been adequately explained. All of these challenges fail.

Section 7 of the NLRA states that "[e]mployees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. It follows, therefore, that if "hav[ing] a coworker present at an investigatory interview which the employee reasonably believes might result in disciplinary action," *Board Decision*, at 1, is concerted action for mutual aid or protection, then the Board's decision rests on a permissible construction of the statute. In a unionized workplace, an employee's request for union representation during an investigatory interview is undoubtedly concerted activity for mutual aid and protection. Thus, as noted in *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 832, 104 S.Ct. 1505, 79 L.Ed.2d 839 (1984), even a "lone employee's invocation of a right grounded in his collective-bargaining agreement is . . . a concerted activity in a very real sense." The Foundation argues, however, that an *unrepresented* employee cannot invoke any collective rights of the sort found in a unionized workplace, so a request for a coworker's presence during an investigatory interview cannot be viewed as concerted activity for mutual aid and protection. In other words, because a coworker owes no "duty" to a requesting worker, there is no foundation for "concerted" activity. This view of concerted activity is terribly shortsighted.

The NLRB has determined that the act of requesting another's presence at an investigatory interview "enhances the employees' opportunities to act in concert to address their concern 'that the employer does not initiate or continue a practice of imposing punishment unjustly.'" *Board Decision*, at 3 (quoting *Weingarten*, 420 U.S. at 260-61, 95 S.Ct. 959). In other words, the presence of a coworker gives an employee a potential witness, advisor, and advocate in an adversarial situation, and, ideally, militates against the imposition of unjust discipline by the employer. The Board's position also recognizes that even nonunion employees may have a shared interest in preventing the imposition of unjust punishment,

and an employee's assertion of *Weingarten* invokes this shared interest. The Board's determination that an employee's request for a coworker's presence at an investigatory interview is concerted action for mutual aid and protection and thus within the realm of § 7 is therefore reasonable. And, as the Supreme Court has made clear, "[i]t is the province of the Board, not the courts, to determine whether or not the 'need' [for a *Weingarten*-type rule] exists in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations." *Weingarten*, 420 U.S. at 266, 95 S.Ct. 959.

We agree with the Board that *Weingarten* itself supports the Board's judgment in this case. As the Board noted:

> [We were] correct in *Materials Research* to attach much significance to the fact that the Court's *Weingarten* decision found that the right was grounded in the language of Section 7 of the Act, specifically the right to engage in "concerted activities for the purpose of mutual aid or protection." This rationale is equally applicable in circumstances where employees are not represented by a union, for in these circumstances the right to have a coworker present at an investigatory interview also greatly enhances the employees' opportunities to act in concert to address their concern "that the employer does not initiate or continue a practice of imposing punishment unjustly." Thus, affording *Weingarten* rights to employees in these circumstances effectuates the policy that "Section 7 rights are enjoyed by all employees and are in no wise dependent on union representation for their implementation." *Glomac Plastics, Inc.*, 234 NLRB 1309, 1311, 1978 WL 14203 (1978).

Board Decision, at 3 (footnote omitted).

We find no merit in petitioner's claim, which rests on the dissenting opinion of Board Member Brame, *see id.* at 10,

that an extension of *Weingarten* rights to nonunion workers conflicts with § 9(a) of the Act. The Board's response to this argument is compelling:

> Member Brame contends that, by granting a nonunionized employee the right to have a coworker present in an investigatory interview, we are forcing the employer to "deal with" the equivalent of a labor organization, and t[1] at this conflicts with the exclusivity principle embodied in Section 9(a) of the Act. This contention was squarely addressed and soundly rejected by the Third Circuit Court of Appeals in *Slaughter v. NLRB*, 794 F.2d 120 (1986). "The entire argument," the court said, "rests upon a non sequitur." *Id.* at 127.
>
> > [T]he system of exclusive representation . . . which [it is claimed] . . . would be derogated from by the extension of *Weingarten* to the unorganized, is expressly one of collective bargaining, not of dealing. Accordingly, if, as the Supreme Court held, the employer has no statutory duty to bargain with the *Weingarten* representative, the function of that representative in the unorganized setting cannot be in derogation of the exclusivity principle or any other important statutory policy.
>
> *Id.* at 128 [quoting Matthew W. Finkin, *Labor Law by Boz—A Theory of* Myers Industries, Inc., Sears, Roebuck and Co., *and* Bird Engineering, 71 IOWA L. REV. 155, 182 (1985) (footnotes omitted)]. In other words, even assuming that the role of an employee representative in an investigatory interview is equivalent to "dealing with" the employer, the argument advanced by Member Brame is irrelevant. "Dealing" is not equivalent to "collective bargaining," and the employer is not required to "bargain collectively" with the *Weingarten* representative. As the Third Circuit held, the Section 9(a) exclusivity principle does not limit the Section 7 rights

> of nonunionized employees. In any event, if Member Brame insists that we are forcing a nonunionized employer to deal with the equivalent of a labor organization, he must also believe that an employer would violate Section 8(a)(2) of the Act by *voluntarily* allowing an employee to have a coworker present during the investigatory interview. We find this logic to be strained. More important, it misses the point, discussed above, that an employer is completely free to forego the investigatory interview and pursue other means of resolving the matter. Thus, contrary to Member Brame's assertion, there is no obligation to deal with an employee representative of nonunionized employees.

Board Decision, at 3-4. There is nothing more to be said on this matter, for the Board decision says it all.

In its brief to this court, the Foundation asserts for the first time that the Board's interpretation of the NLRA places an unconstitutional restriction on employer speech. And at oral argument before the court, counsel for the Foundation argued for the first time that, even if *Weingarten* rights are applicable in a nonunionized workplace, the facts of this case do not implicate *Weingarten.* Neither claim is properly before the court, because neither was raised with the Board in the first instance. Under § 10 of the Act, "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e); *see Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 978 (D.C.Cir.1998). There are no extraordinary circumstances here. Although the Foundation could not challenge the Board's findings regarding the factual predicates supporting the application of *Weingarten* until after the issuance of the Board's decision, it could have objected to the Board's decision in a petition for rehearing. "The failure to do so

prevents consideration of the question by the courts." *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666, 102 S.Ct. 2071, 72 L.Ed.2d 398 (1982).

Finally, the Foundation argues that the Board has not provided an adequate explanation for its decision. We need not tarry long over this claim, for it is plainly meritless. Apart from the detailed discussions recited above, the Board also relied heavily on its prior decision in *Materials Research* to support the judgment that *Weingarten* rights are applicable in nonunion workplaces. *See Board Decision*, at 3. The Board's conclusion obviously is debatable (because the Board has "changed its mind" several times in addressing this issue); but the rationale underlying the decision in this case is both clear and reasonable. That is all that is necessary to garner deference from the court. "When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The Foundation's challenge here is merely an attack on the wisdom of the agency's policy, and, therefore, the challenge must fail.

B. Retroactivity

The Foundation argues that even if the NLRB's new interpretation of § 7 is upheld, the holding that *Weingarten* rights are applicable in nonunion workplaces should not apply retroactively to impose damages for Borgs' discharge. We agree.

In considering whether to give retroactive application to a new rule,

> [t]he governing principle is that when there is a "substitution of new law for old law that was reasonably clear," the new rule may justifiably be given prospectively-only effect in order to "protect the settled

> expectations of those who had relied on the preexisting rule." *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C.Cir.1993). By contrast, retroactive effect is appropriate for "new applications of [existing] law, clarifications, and additions." *Id.*

Pub. Serv. Co. of Colo. v. FERC, 91 F.3d 1478, 1488 (D.C.Cir.1996); *see also Aliceville Hydro Assocs. v. FERC*, 800 F.2d 1147, 1152 (D.C.Cir.1986) (discussing the distinction between "new applications of law" and "substitutions of new law for old law").

In light of this governing principle, there is little doubt here that the Board erred in giving retroactive effect to its new interpretation of § 7. At the time when this case arose, the Board's policy on the application of *Weingarten* rights was absolutely clear—employees not represented by a union could not invoke *Weingarten*. Thus, Borgs unquestionably had no right to have a coworker present at an interview with his supervisors. And the employer obviously acted in conformity with the prevailing law in denying Borgs' request to have a coworker present during his scheduled interview. Neither Borgs nor the Foundation could have known for sure that the established law might change, so Borgs acted at his peril in defying his employer and the Foundation acted with no apparent risk in following the law.

In these circumstances, "notions of equity and fairness," *see Cassell v. FCC*, 154 F.3d 478, 486 (D.C.Cir.1998), militate strongly against retroactive application of the Board's "substitution of new law for old law that was reasonably clear," *Aliceville Hydro*, 800 F.2d at 1152. Indeed, it would be a "manifest injustice" to require the Foundation to pay damages to an employee who, without legal right, flagrantly defied his employer's *lawful* instructions. *See Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C.Cir.1987). We therefore decline to enforce the Board's decision on retroactivity.

C. Substantial Evidence Relating to Hasan's Discharge

The final issue in dispute concerns the Board's holding that the Foundation committed an unfair labor practice when it reprimanded and discharged Hasan. The Foundation claims that Hasan was disciplined for insubordination. The Board, however, found that the acts of defiance by Hasan and Borgs against their supervisors were merely attempts by the employees to "raise issues related to their conditions of employment." *Board Decision*, at 6-7. Thus, according to the Board, Hasan was engaged in protected concerted activity which was the motivating factor for his employer's decision to reprimand and thereafter terminate him. *Id.* at 6. Because we can find no support in the record for the Board's decision, we reverse.

It is well understood that this court must uphold factual findings of the Board if they are supported by substantial evidence. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88, 71 S.Ct. 456, 95 L.Ed. 456 (1951). "The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." *Id.* at 490, 71 S.Ct. 456. Thus, "a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Id.* at 488, 71 S.Ct. 456. On the record at hand, we find that the body of evidence opposed to the Board's view is overwhelming.

The Foundation reprimanded and then terminated Hasan because of his "gross insubordination" in signing and delivering the January 17 memo to his supervisors, and for his subsequent refusal to sign performance objectives. In the

January 17 memo, Borgs and Hasan defiantly "reiterate[d]" to their supervisor that "[his] supervision of the program operations performed by them [was] not required." *Board Decision*, at 1 n.4. This was indisputably an act of gross insubordination, just as the Foundation claims. The Board, however, purports to excuse the insubordination by finding that the employees' January 17 and 29 memoranda were "inextricably intertwined," *see id.* at 6, and that the January 29 memo somehow alleviated the preceding insubordination. This outlandish reasoning draws no support from the evidence in the record.

On January 17, Hasan flatly asserted that he would not recognize the authority of his current supervisor, or any other supervisor for that matter. *See Board Decision*, at 1 n.4 (stating "[o]nly support staff assistance is needed"). The memo contained no specific objections to any terms and conditions of employment, but, rather, simply rejected Berger's supervision. Therefore, the situation here does not fall within the "narrow category of cases" where "the identity of the supervisor is directly related to terms and conditions of employment" and concerted activity "to effect the discharge or replacement of [that] supervisor" may thus be protected. *See NLRB v. Oakes Mach. Corp.*, 897 F.2d 84, 89 (2d Cir.1990). The January 29 memo, sent nearly two weeks later, merely discussed the *opinions and feelings* of Hasan; it did not address Hasan's prior insubordinate *conduct*. Even if Hasan could somehow recast his prior conduct as protected activity, the January 29 memo did not do so, because Hasan never purported to apologize or distance himself in any way from the January 17 memo. At oral argument, counsel for the Board suggested that Hasan and Borgs were simply "inartful" in their objection to their working conditions and that the January 29 memo more accurately explains Hasan's and Borgs' complaints regarding the terms and conditions of their employment. *See also Board Decision*, at 7. This position is wholly untenable. The January 17 memo admits of only one

fair reading: Borgs and Hasan told their supervisor that they would not recognize his authority in connection with their work. That was insubordination, not protected concerted activity. Therefore, Hasan was properly reprimanded for this act of insubordination.

Hasan received a written reprimand immediately after his meeting with management on February 1 concerning the January 17 memo. He knew from this written reprimand that he had committed an act of "gross insubordination" and that any further acts of misconduct or insubordination would result in his termination. Despite this fair warning (which, so far as we can tell, he never protested), Hasan subsequently refused to sign performance objectives given to him by his supervisor. He was then fired. The Board does not suggest that Hasan's refusal to sign the performance objectives was protected activity, for it was not. Rather, according to the Board, "the discharge was not solely due to the failure to sign the performance objectives, but rather was linked to the Respondent's anger at Hasan for his protected activity, especially his involvement with the January 17 memo." *Board Decision*, at 7. The glaring flaw in the Board's reasoning is the erroneous assumption that the January 17 memo was protected. It was not, so the termination of Hasan for his involvement with the January 17 memo and his subsequent refusal to sign performance objectives was not unlawful.

The Board suggests that an "attempt by employees to cause the removal of their supervisor is protected when 'it is evident that [the supervisor's conduct] had an impact on employee working conditions.'" *Id.* at 6. This may be true, but the principle is inapposite in this case. The January 17 memo was a *directive* from Borgs and Hasan to their supervisor that they would no longer recognize his supervisory authority. The memo did not otherwise mention working conditions, nor did it protest that the supervisor's conduct was somehow having an adverse impact on employee working conditions.

See Board Decision, at 22-23 (dissenting opinion of Member Brame); 31 (ALJ's findings regarding the January 17 memo). The dissenting opinion of Member Hurtgen summarizes the record evidence perfectly:

> In sum, the January 17 memo was unprotected because it sought the discharge of supervisor Berger. There is no showing that the effort to discharge the supervisor was prompted by supervisory conduct affecting employees' terms and conditions of employment. The January 17 memo did not become protected by reason of the later memo of January 29. The [Foundation] was critical of the January 17 memo, and thus Hasan and Borgs wrote another memo on January 29. As the [ALJ] correctly found, this memo was simply an after-the-fact attempt at damage control. In any event, the January 29 letter did not raise the anger of the [Foundation]. Indeed, the [Foundation], through Loehrke, met with Hasan to discuss that memo. It was the January 17 letter that raised the anger of [Foundation], and that letter was unprotected.

Board Decision, at 10.

The Board does not have authority to regulate all behavior in the workplace and it cannot function as a ubiquitous "personnel manager," supplanting its judgment on how to respond to unprotected, insubordinate behavior for those of an employer. It is well recognized that an employer is free to lawfully run its business as it pleases. This means that an employer may discharge an employee for a good reason, a bad reason, or no reason, so long as it is not for an unlawful reason. *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 394, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983) ("The National Labor Relations Act . . . makes unlawful the discharge of a worker because of union activity . . . but employers retain the right to discharge workers for any number of other reasons unrelated to the employee's union activities."); *Wright Line*, 251 N.L.R.B. 1083, 1089, 1980 WL 12312

(1980) (establishing a test "to determine the relationship, if any, between employer action and protected employee conduct"). Although the Board has considerable leeway in determining the exact scope of protected activity, *see Weingarten*, 420 U.S. at 266, 95 S.Ct. 959, it has no authority to extend the protections of the Act to plainly insubordinate behavior unrelated to the terms and conditions of employment. Because absolutely no evidence supports any nexus between the January 17 memo and any protected activity by Hasan concerning the terms and conditions of his employment, we reverse the NLRB's finding with regard to Hasan.

III. CONCLUSION

For the foregoing reasons, we deny in part and grant in part the petition for review, and grant in part and deny in part the cross-application for enforcement. We grant the cross-application for enforcement for the Board's decision to extend *Weingarten* under § 7 of the Act to nonunion employees. We reverse the Board's retroactive application of their new interpretation and the Board's findings that the Foundation discharged Borgs and Hasan for engaging in protected activity.

So ordered.

APPENDIX B

Cases 8-CA-28169 and 8-CA-28264

EPILEPSY FOUNDATION OF NORTHEAST OHIO

and

ARNIS BORGS

and

ASHRAFUL HASAN

July 10, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On January 2, 1998, Administrative Law Judge Richard A. Scully issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F. 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Introduction

The General Counsel excepts to the judge's finding that the Respondent did not violate Section 8(a)(1) of the Act by discharging employees Arnis Borgs and Ashraful Hasan. The General Counsel contends that both Borgs and Hasan were discharged for engaging in protected concerted activity. In arguing that the discharge of Borgs is unlawful, the General Counsel requests the Board to once again consider the question of whether the principles set forth by the Supreme Court in *NLRB v. J. Weingarten*[2] should be extended to employees in nonunionized workplaces, to afford them the right to have a coworker present at an investigatory interview which the employee reasonably believes might result in disciplinary action. The General Counsel contends that affording nonunionized employees this right is consistent with the Court's decision. We agree with the General Counsel's contentions, including those concerning *Weingarten*, and for the reasons set forth below, find that the discharges of both Borgs and Hasan are unlawful.

The Discharge of Arnis Borgs

The essential facts pertaining to Borgs' discharge are not in dispute. The Respondent provides services to persons affected by epilepsy. One of its programs involves a research project concerning school-to-work transition for teenagers with epilepsy. Borgs worked on this project as an employment specialist, and Ashraful Hasan was the Respondent's transition specialist on this project.

On January 17, 1996,[3] Borgs and Hasan prepared a memo to the Respondent's director of vocational services, Rick Berger, who was their supervisor on the project. The memo stated that Berger's supervision of Borgs and Hasan was no

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[2] 420 U.S. 251 (1975).

[3] All dates hereafter are in 1996 unless stated otherwise.

longer required.[4] A copy of this memo was also sent to the Respondent's Executive Director, Christine Loehrke. Thereafter, Borgs and Hasan learned that Loehrke and Berger were very unhappy about the memo. In view of this reaction, on January 29, Hasan and Borgs prepared another memo, this time addressed to Loehrke, which elaborated on the reasons for their prior assertion that Berger's supervision was no longer required. Specifically, the memo was critical of Berger's involvement in the program, and cited several examples of incidents where, in their view, Berger acted inappropriately.

On February 1, Loehrke approached Borgs and directed him to meet with her and Berger. Borgs felt intimidated by the prospect of meeting with both Loehrke and Berger together because of a reprimand he received at a prior meeting with them,[5] and expressed these reservations to Loehrke. Borgs asked if he could instead meet with Loehrke

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[4] The memo read as follows:

> Mr. Jim Troxell and Dr. Bob Fraser have continued to provide supervisory input pertaining to service delivery and the research component of the study. During the past several months, Ms. Christine Loehrke has also provided input and assistance to the NIDRR School-to-Work Project.
>
> As mentioned during earlier discussions (albeit brief) with you, both Dr. Ashraful Hasan and Mr. Arnis Borgs reiterate that your supervision of the program operations performed by them is not required.
>
> Your input to the NIDRR project in the past is appreciated. At this stage the major area which has to be addressed—deals with outreach. Only support staff assistance is needed in this regard.

[5] In December 1995 Borgs was called into a meeting with Berger, Loehrke, and another supervisor, and was interrogated about his discussions about salary information with other employees. He was also reprimanded at that meeting for having the salary discussions. No exceptions were filed to the judge's finding that this conduct violated Sec. 8(a)(1) of the Act.

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alone. Loehrke refused Borgs' request. Borgs then asked if Hasan could be present with him at this meeting, but Loehrke refused this request as well. Borgs continued to express his opposition to meeting alone with Loehrke and Berger, and in response to this opposition, Loehrke told Borgs to go home for the day and report back at 9 a.m. the next morning.

The following day, Borgs met with Loehrke and Jim Wilson, the Respondent's Director of Administration. Loehrke told Borgs that his refusal to meet the previous day constituted gross insubordination and that he was terminated. Loehrke then gave Borgs a letter of termination.[6]

The judge found that the Respondent discharged Borgs for his persistent refusal to comply with Loehrke's directive to meet alone with her and Berger. The judge noted that, under *Weingarten*, employees in unionized work forces are entitled to representation in investigatory interviews which the employee reasonably believes could result in disciplinary action, but under current Board precedent, employees in nonunionized workplaces do not have the right to have a coworker present in similar circumstances. *E. I. DuPont & Co.*, 289 NLRB 627 (1988). Accordingly, the judge found that Borgs had no statutory right to condition his attendance at the meeting on the presence of Hasan, and thus the Respondent's discharge of Borgs for refusing to attend the meeting did not violate Section 8(a)(1) of the Act.

We agree with the judge's finding that Borgs was discharged for refusing to attend the meeting with Loehrke and

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[6] In addition to describing the failure to attend the meeting as gross insubordination, the letter also made reference to the January 17 memo, as well as to a "failure to build constructive work relationships with management personnel," and a "resistance to accept responsibility for attempting to attain articulated performance goals." The letter did not refer to these other acts as examples of gross insubordination.

Berger.[7] We also agree that the judge accurately applied the relevant Board precedent. After careful consideration, however, we find that precedent to be inconsistent with the rationale articulated in the Supreme Court's *Weingarten* decision, and with the purposes of the Act. Consequently, we shall overrule that precedent today and find that that the Respondent's termination of Borgs for his attempt to have a coworker present at the meeting was unlawful.

Our examination of this issue begins with the Supreme Court's seminal *Weingarten* decision. There, as noted above, the Court held that an employer violated Section 8(a)(1) by denying an employee's request that a union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action. The Court, in upholding the Board's finding of a violation, found that the employee's action in seeking representation in such circumstances "falls within the literal wording of Section 7 of the Act that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of mutual aid or protection." Id. at 260. The Court explained further as follows:

> The union representative whose participation he seeks is however safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. *Id.*

Read together, these statements explain that the right to the presence of a representative is grounded in the rationale that the Act generally affords employees the opportunity to act together to address the issue of an employer's practice of imposing unjust punishment on employees.

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[7] We also note that the Respondent does not contend that Borgs was discharged for any other reason.

Because the facts at issue in *Weingarten* involved a request for the presence of a union representative, the Court's decision did not specifically refer to circumstances involving the request for a coworker representative in nonunion settings. The Board, however, has addressed this precise issue on several occasions. In *Materials Research Corp.*, 262 NLRB 1010 (1982), the Board found that the *Weingarten* right includes the right to request the presence of a coworker at an investigatory interview in a nonunion setting. In that case, the Board relied on the fact that *Weingarten* emphasized that the right to the assistance of a representative is derived from the Section 7 protection afforded to concerted activity, rather than from a union's right pursuant to Section 9 to act as the employee's representative for the purpose of collective bargaining. Consequently, the Board found that the ability to avail oneself of this protection does not depend on whether the employees are represented by a union.

The Board overruled *Materials Research Corp.*, however, in *Sears, Roebuck & Co.*, 274 NLRB 230 (1985), and held there that *Weingarten* principles do not apply in circumstances where there is no certified or recognized union. In that case, the Board specifically rejected the prior decision's reliance on the fact that the *Weingarten* rights are based on Section 7, stating that "[t]he scope of Section 7's protections may vary depending on whether employees are represented or unrepresented. . . ." The Board also expressed the view that extending *Weingarten* rights to employees not represented by a union is inconsistent with the Act because it infringes upon an employer's right to deal with employees on an individual basis when no union is present. *Id.* at 231.

The Board modified the *Sears* rationale in *E. I. DuPont & Co.*, 289 NLRB 627 (1988). In that case, the Board adhered to its position that *Weingarten* rights are not applicable in nonunion settings, but acknowledged that "the statute might be amenable to other interpretations." *Id.* at 628. Thus, the

Board specifically disavowed *Sears* insofar as it held that the Act compels a finding that *Weingarten* rights are applicable only in unionized workplaces. *Id.* at fn. 8. The Board, however, declined to return to the rule of *Materials Research* for several reasons. First, the Board stated that the Court in *Weingarten* placed the issue in the context of the Act's purpose of redressing the perceived balance of economic power between labor and management, and that this consideration is of lesser significance if the employees are not represented by a union. Second, the Board stated that in a nonunion setting, the employee representative has no obligation to represent the interests of the entire unit, and thus it is less likely that the representative's presence will safeguard the interests of employees as a group. *Id.* at 629. Third, the Board stated that it is less likely that the employee representative would have the skills equivalent to those that a union representative would have to provide effective representation to the employee. *Id.* Finally, the Board stated that the assertion of a *Weingarten* right might be more detrimental to the employee in a nonunion setting if the employer then decides to forego the interview rather than conduct it with an employee representative. The Board explained that, unlike the union-represented employee who had a framework for resolving grievances, the unrepresented employee could lose his only opportunity to present his side of the issue. *Id.* at 630. Accordingly, while recognizing that the Board's holding in *Materials Research* was not necessarily inconsistent with the purposes of the Act, the Board in *Dupont* declined to return to the holding of that case.

We disagree with the Board's holdings in *Sears* and *Dupont*, and find that a return to the rule set forth in *Materials Research, i.e.*, that *Weingarten* rights are applicable in the nonunionized workplace as well as the unionized

workplace, is warranted.[8] *Sears* and *Dupont* misconstrue the language of *Weingarten* and erroneously limit its applicability to the unionized workplace. In our view, the Board was correct in *Materials Research* to attach much significance to the fact that the Court's *Weingarten* decision found that the right was grounded in the language of Section 7 of the Act, specifically the right to engage in "concerted activities for the purpose of mutual aid or protection." This rationale is equally applicable in circumstances where employees are not represented by a union, for in these circumstances the right to have a coworker present at an investigatory interview also greatly enhances the employees' opportunities to act in concert to address their concern "that the employer does not initiate or continue a practice of imposing punishment unjustly."[9] Thus, affording *Weingarten* rights to employees in these circumstances effectuates the policy that "Section 7 rights are enjoyed by all employees and are in no wise dependent on union representation for their implementation." *Glomac Plastics, Inc.*, 234 NLRB 1309, 1311 (1978).[10]

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[8] We agree with Member Hurtgen that the Board should not reverse important legal doctrine absent compelling considerations for doing so. Contrary to our colleague, however, we find that such compelling considerations are present here because, as explained below, the doctrine infringes upon the exercise of Sec. 7 rights and is inconsistent both with Supreme Court precedent and the policies of the Act.

[9] Member Hurtgen asserts that the Court in *Weingarten* could not have contemplated the affording of such a right to employees in a nonunion setting because the Court in its discussion referred to the role played by "the union representative whose participation [the employee] seeks" in safeguarding the interests of "the bargaining unit." These terms, however, are necessary to accurately describe the unionized circumstances that were before the Court in that case. In view of the Court's reference to this right as one grounded in Sec. 7 of the Act, the Court's use of the terms "union representative" and "bargaining unit" does not establish that the Court did not envisage the right to such representation in a nonunion setting.

[10] We disagree with our dissenting colleagues' assertions that Sec. 7 of the Act gives nonunionized employees only the right to seek the

We find no merit to the contention raised in *Sears*, and subsequently disavowed in *Dupont*, that the imposition of *Weingarten* rights in these circumstances "wreaks havoc" with the provisions of the Act that enable an employer to deal with employees on an individual basis when no union is present. The Act clearly protects the right of employees—whether unionized or not—to act in concert for mutual aid or protection. Further, as noted above, the right to have a coworker present at the investigatory interview affords unrepresented employees the opportunity to act in concert to prevent a practice of unjust punishment.[11] While an employer is generally free to deal with employees individually in the absence of union representation, an employer may not mask the obstruction of employee efforts to exercise Section 7

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assistance of a coworker at an investigatory interview, not the right to the actual assistance. It is the actual presence of the coworker, not the request for one, that affords employees the ability to act in concert for mutual aid or protection. In our view, the right to make such a request is devoid of any substance without a corresponding right to have the request granted.

[11] Member Hurtgen asserts that our holding today alters the balance between an employee's interest in assistance and "an employer's interest in having an unfettered investigation." He fails to state, however, how the presence of such a representative would impair the ability to have an "unfettered investigation." In our view, such speculation does not warrant depriving employees of the opportunity to act for mutual aid or protection in these circumstances.

Member Brame asks why nonunionized employees should be entitled to the presence of a coworker at an investigatory interview when nonunionized employees are not entitled to the presence of a coworker at meetings to discuss other issues. The answer to this question, of course, is that the principles set forth in the Supreme Court's *Weingargten* decision speak only to this specific right. Member Brame's speculation about other circumstances involving nonunionized employees is not encompassed within the *Weingargten* rationale, and is not before us today. Thus, there is no merit to his assertion that our decision today has implications beyond the specific rule enunciated herein. In fact, our holding has no greater or less applicability than did the Board's prior holding in *Materials Research*.

rights by asserting a right to deal on an individual basis. See generally, *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 844-850 (2d Cir. 1980).

Member Brame contends that, by granting a nonunionized employee the right to have a coworker present in an investigatory interview, we are forcing the employer to "deal with" the equivalent of a labor organization, and that this conflicts with the exclusivity principle embodied in Section 9(a) of the Act. This contention was squarely addressed and soundly rejected by the Third Circuit Court of Appeals in *Slaughter v. NLRB*, 794 F.2d 120 (1986). "The entire argument," the court said, "rests upon a non sequitur." *Id.* at 127.

> [T]he system of exclusive representation . . . which [it is claimed] . . . would be derogated from by the extension of *Weinarten* to the unorganized, is expressly one of collective bargaining, not of dealing. Accordingly, if, as the Supreme Court held, the employer has no statutory duty to bargain with the *Weingarten* representative, the function of that representative in the unorganized setting cannot be in derogation of the exclusivity principle or any other important statutory policy. *Id.* at 128.

In other words, even assuming that the role of an employee representative in an investigatory interview is equivalent to "dealing with" the employer, the argument advanced by Member Brame is irrelevant. "Dealing" is not equivalent to "collective bargaining," and the employer is not required to "bargain collectively" with the *Weingarten* representative. As the Third Circuit held, the Section 9(a) exclusivity principle does not limit the Section 7 rights of nonunionized employees. In any event, if Member Brame insists that we are forcing a nonunionized employer to deal with the equivalent of a labor organization, he must also believe that an employer would violate Section 8(a)(2) of the Act by *voluntarily* allowing an employee to have a coworker present during the investigatory interview. We find this logic to be strained.

More important, it misses the point, discussed above, that an employer is completely free to forego the investigatory interview and pursue other means of resolving the matter. Thus, contrary to Member Brame's assertion, there is no obligation to deal with an employee representative of nonunionized employees.

We also find that the concerns raised by the Board in *Dupont* do not warrant allowing an employer to prohibit the exercise of *Weingarten* rights in nonunionized workplaces. Specifically, we take issue with *Dupont's* reliance on the notions that the coworker has "no obligation" to represent the interests of fellow employees, and that the nonunionized coworker is less likely to have the skills necessary to provide representation comparable to that provided by a shop steward or some other union representative. The notion that employees in such circumstances would not be motivated to act in the interests of their fellow workers, or that employees might lack the abilities to offer constructive assistance to the interviewed employee, is wholly speculative.[12] It also misses

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[12] Indeed, Member Brame's dissent relies heavily on such speculation. He speculates that the nonunionized coworker would be more hostile to the employer, less likely to have the same incentives to safeguard the wider interests of fellow employees, and unlikely to be of any assistance to the employer. As mentioned above, such speculation cannot serve as a legitimate basis for depriving employees of the right to act in concert for mutual aid and protection. The likelihood that any particular concerted activity will ultimately achieve its intended result is not the controlling consideration in determining whether that activity is protected by Sec. 7 of the Act. What is important is that employees are afforded the opportunity to "engage in concerted activities for mutual aid or protection." To that end, we find that Member Brame's emphasis on the notion that a coworker representative may not effectively serve the employer's interests reveals a disproportionate focus on the employer's interests at the expense of denying employees their right and opportunity to engage in Sec. 7 activity.

Further, we disagree with Member Brame's assertion that our refusal to engage in similar speculation "flies in the face of *Weingarten* itself."

the point that the employee is free to choose whether to request or forego representation. What is important is the availability of the option. Moreover, Section 7 rights do not turn on either the skills or the motives of the employee's representative. Thus, these supposed concerns do not legitimately warrant foreclosing employees from the opportunity to avail themselves of the protections of the Act.

We also cannot agree with the statement in *Dupont* that extending *Weingarten* rights to the nonunion workplace will actually work to the detriment of employees by encouraging employers to forego the investigatory interview and thus leave the aggrieved employee without an opportunity to tell his or her side of the story. 289 NLRB at 630. This too is based wholly on speculation, and assumes the worst in employer motives. In addition, such rationale ignores the fact that employees are not *obligated* to request the presence of a *Weingarten* representative, and—as in the unionized workplace—can freely evaluate the strategic merits of any particular course of action in this regard.

Finally, we find no force in Member Hurtgen's contention that affording *Weingarten* rights to nonunionized employees places an "unknown trip wire" on employers who are legitimately pursuing investigations of employee conduct. Our colleague speculates that employers in nonunionized settings will be completely unaware of an employee's right to a *Weingarten* representative. We do not agree with his speculation. In any event, we fail to understand how an employer's ignorance of employee rights provides a justification for denying those rights to employees.

In sum, we hold today that the rule enunciated in *Weingarten* applies to employees not represented by a union

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Although the Court mentioned that a knowledgeable union representative "could" be of assistance to the employer, it did not limit this right to circumstances where the representative might be of such assistance.

as well as to those that are. We overrule the Board's decision in *Dupont* and return to the standard set forth in *Materials Research Corp.* In addition, we also shall apply the rule enunciated today to the facts of this case and find that the Respondent violated Section 8(a)(1) of the Act by terminating Borgs for insisting on having his coworker, Hasan, present at an investigatory interview. Such application is warranted in view of the well-settled retroactivity doctrine. As the court stated in *NLRB v. Bufco Corp.*, 899 F.2d 608 (7th Cir. 1990):

> Generally, a decision which changes existing law or policy is given retroactive effect unless retroactive application would cause "manifest injustice." *NLRB v. Affiliated Midwest Hosp., Inc.*, 789 F.2d 524 (7th Cir. 1986) (quoting *NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 757 (7th Cir. 1981) (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971)). In determining whether manifest injustice is caused by the retroactive application of a Board rule we consider the following: "the reliance of the parties on pre-existing law, the effect of retroactivity on accomplishing the purpose of the law; and any injustice arising from retroactive application." *NLRB v. Chicago Marine Containers, Inc.*, 745 F.2d 493, 499 (7th Cir. 1984). Id. at 611-612.

We find that the application of the *Weingarten* rule in this case will not work a manifest injustice. First, there is no evidence in the record even remotely suggesting that the Respondent was relying on the state of Board law when it decided to take action against Borgs. Second, applying the rule in this proceeding serves to correct effects of the imposition of discipline on an employee for availing himself of the right to engage in protected activity, and thus serves the purpose of promoting the right of employees to engage in concerted activity for mutual aid and protection. Indeed, the purposes of the Act are not served by subjecting Borgs to the continued consequences of his discharge. Finally, we see no great

injustice to the Respondent in finding a violation here and requiring the reinstatement of Borgs, particularly in view of the 8(a)(1) findings by the judge that have not been excepted to,[13] as well as those discussed infra, which demonstrate that the Respondent was not receptive to the right of its employees to engage in protected concerted activity.

Accordingly, for all these reasons, we find that by discharging Arnis Borgs for demanding that a coworker accompany him at an investigatory interview, the Respondent violated Section 8(a)(1) of the Act as alleged.[14]

The Reprimand and Discharge of Ashraful Hasan

As discussed above, Hasan worked as a transition specialist for the Respondent's school-to-work transition project. The record shows that, beginning around August 1995, Hasan engaged in concerted activity together with Borgs. From August through December 1995, Hasan and Borgs organized and engaged in a brown bag lunch program whereby employees would get together to discuss matters of mutual

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[13] In addition to the findings discussed supra at fn. 5, there were noexceptions to the judge's finding that the Respondent violated Sec. 8(a)(1) by promulgating a rule prohibiting employees from discussing wage information with other employees.

[14] Because we find that the Respondent unlawfully discharged Borgs for attempting to avail himself of the right to have a coworker accompany him at an investigatory interview, we find it unnecessary to pass on the General Counsel's contention that the Respondent's discharge of Borgs was unlawful even absent a return to the rule set forth in *Materials Research Corp.*

Because we find that the reason for Borgs' discharge was his refusal to participate in an investigatory interview without the presence of a coworker, the appropriate remedy is reinstatement with backpay. *Safeway Stores, Inc.*, 303 NLRB 989 (1991). Thus, the instant case is distinguishable from *Taracorp., Inc.*, 273 NLRB 221 (1984) and its progeny, which hold that an employee denied his *Weingarten* rights is not entitled to reinstatement and backpay if he has been discharged for misconduct or any other nondiscriminatory reason.

concern. Further, in November 1995, Hasan and Borgs started an ethics committee which gave employees an opportunity to address problems concerning employee relations and delivery of service to clients. Two meetings of the ethics committee were held in November 1995, and minutes of the meetings were posted at the Respondent's office.

In addition, sometime prior to October 5, 1995, Hasan reviewed his personnel file and discovered a memo from Berger, dated June 7, 1995, referencing an earlier misunderstanding Hasan and Borgs had with Berger concerning the hiring of an interpreter without following the Respondent's subcontracting procedure. Although Hasan and Borgs believed that the misunderstanding surrounding this incident had been resolved to everyone's satisfaction, the memo stated that Hasan and Borgs had been given verbal warnings for their actions concerning this incident. On October 5, 1995, Hasan wrote a memo to Berger in which he complained about the warnings in the personnel files and demanded an explanation. Hasan gave copies of the memo to Borgs and Loehrke. Shortly thereafter, Berger, with the assistance of Loehrke, sent a responding memo to Hasan which criticized the insubordinate tone of Hasan's memo and accused Hasan of undermining Berger's supervision of Borgs by sending a copy of the memo to him.

Also, as set forth above, Hasan—along with Borgs—prepared the January 17 and 29 memos criticizing Berger's supervision of them. As with Borgs, Hasan was directed to meet with Loehrke and Berger on February 1. Unlike Borgs, however, Hasan agreed to meet alone with them. At this meeting, Loehrke expressed her displeasure with the January 17 memo.[15] Hasan responded by stating that the memo was a

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[15] Hasan testified that Loehrke expressed her annoyance with the January 29 memo. Loehrke testified, however, that she only referred to the January 17 memo at the meeting. The judge did not resolve this discrepancy in the testimony.

needs assessment. Hasan was then given a written warning, stating that the January 17 memo constituted insubordination and that any further acts of misconduct or insubordination by Hasan would result in his immediate discharge.

Thereafter, about March 6, Berger gave Hasan a copy of his evaluation. Hasan did not sign off on the evaluation, and told Berger that he would be adding some comments to the evaluation, as he had done on previous evaluations. About March 13 or shortly thereafter, Berger presented Hasan with written personal performance goals. As with his evaluations, Hasan had some comments to add to the performance goals, and consequently did not sign off on the document upon receiving it from Berger.

On March 25, Hasan was called to Loehrke's office whereupon she advised him that he was terminated.[16] On March 29, Hasan was given a termination letter from Loehrke explaining that over the past nine months the Respondent had raised concerns with Hasan about his conduct. The letter further indicated that the more serious concerns included Hasan's continued refusal to accept supervision, and Hasan's various confrontations with other staff members. The letter did not discuss or refer to any specific incident, but stated that he was being terminated because of his "demonstrated conduct."

The judge found that the Respondent did not violate Section 8(a)(1) of the Act by reprimanding and terminating Hasan. The judge began his analysis by finding no evidence of animus towards Hasan's involvement with the brown bag lunch program and the ethics committee. The judge further found that these events, as well as the October dispute concerning the memo in the personnel files, although protected, were remote in time and unrelated to the events leading to his discharge.

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[16] Hasan testified that he was given no reason for his termination at the meeting. Loehrke's notes state that she raised the failure to sign the performance objectives at the meeting.

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The judge next found that the January 17 memo to Berger from Hasan and Borgs, although concerted, was not activity protected by the Act. Specifically, the judge rejected the assertion that the memo was a needs assessment, and instead found it to be an attempt by Hasan and Borgs to dismiss Berger as their supervisor on the project. The judge also regarded the January 29 memo as nothing more than an after-the-fact attempt at damage control. Thus, the judge found the memo writing was not protected because it failed to raise concerns about the quality of the project or of Berger's supervision. Accordingly, the judge found the Respondent's reprimand of Hasan for this conduct did not violate Section 8(a)(1).

Finally, the judge noted that the record showed that Hasan had been involved in several incidents having nothing to do with protected activity, including the incidents involving the hiring of the interpreter, his demands for preferential clerical assistance, an incident in which Hasan was accused of not showing sensitivity towards the parents of an agency client, and Hasan's failure to sign the Respondent's statement of performance objectives. In view of these incidents, as well as the circumstances surrounding the January memos, the judge concluded that there was no evidence to support an inference that animus towards protected activity was a motivating factor in the Respondent's decision to discharge Hasan. Accordingly, the judge found that the Respondent's discharge of Hasan did not violate Section 8(a)(1) of the Act.

We disagree with the judge's finding that Hasan's reprimand and discharge were lawful. Applying the principles set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 800 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), we find, contrary to the judge, that the General Counsel has shown that Hasan's protected activity was a motivating factor in the Respondent's decision to reprimand and thereafter

terminate him, and that the Respondent has failed to show that it would have taken this action against Hasan even in the absence of his protected activity.

We find error with the judge's primary finding with respect to Hasan, *i.e.*, that the January 17 memo by Hasan and Borgs did not constitute protected concerted activity. Specifically, we disagree with the finding that the memo was not protected because it was an attempt to dismiss Berger as their supervisor. Even assuming that was the sole or primary purpose of the memo, such purpose does not remove the conduct from the protections of the Act. Indeed, the attempt by employees to cause the removal of their supervisor is protected when "it is evident that [the supervisor's conduct] had an impact on employee working conditions." *Caterpillar, Inc.*, 321 NLRB 1178, 1179 (1996), vacated as moot (March 19, 1998), citing *Hoytuck Corp.*, 285 NLRB 904 fn. 3 (1987). Clearly, Berger's supervisory duties had a significant impact on Hasan's terms and conditions of employment, as evidenced by the warnings he received, his evaluations, and his ultimate discharge.[17]

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[17] We find no merit to Member Hurtgen's contention that the January 17 memo was unprotected because the General Counsel did not establish that the memo related to supervisory conduct affecting the employees. To the extent that the Respondent could have initially harbored some doubt as to whether the memo was related to Berger's impact on Hasan and Borgs' terms and conditions of employment, any such doubt was clearly laid to rest by the memo Loehrke received on January 29. As noted above, that memo elaborated on the assertion made in the January 17 memo, and specifically referenced issues such as Berger's use of threatening and abusive language towards employees, Berger requiring Hasan to personally pay for his clients' medical services, critical allegations that Berger placed in Hasan's personnel file, and Berger's critical comments about Hasan's salary negotiations. Thus, neither *Lutheran Social Services*, 250 NLRB 35 (1980), nor *Hoytuck Corp., supra*, cited by our colleague, supports his position, because the Board held in both cases that such activity is protected when the supervisor's conduct relates to the employees' conditions of employment.

We also find, contrary to the judge, that the January 17 memo was inextricably intertwined with the January 29 memo, which also implicated terms and conditions of employment by its discussion of the problems they were having with Berger. Thus, insofar as Loehrke and Berger had read both memos by February 1, they fully understood that the issues raised in the January 17 memo were not separate from the concerns about Borgs and Hasan were being treated by their supervisor as set forth in the subsequent memo.[18] Thus, the memo writing clearly was an attempt by Hasan and Borgs to raise issues related to their conditions of employment, and, consequently Loehrke's reprimand of Hasan for engaging in this conduct violated Section 8(a)(1) of the Act.[19]

We further find that, in view of our finding that Hasan's involvement in the January 17 memo constitutes protected concerted activity, the Respondent's termination of Hasan was unlawful. Indeed, as noted above, the Respondent placed Hasan on the verge of termination for his involvement with the memo, as evidenced by the formal reprimand which included the warning that any other acts of misconduct would result in his termination. Also, Hasan's termination letter

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[18] In agreeing with the judge's finding that the January 29 memo was an after-the-fact attempt at damage control, Member Brame contends—at least implicitly—that the January 17 memo must have related to something other than supervisory conduct affecting the employees. There is no evidence in support of this contention. To the contrary, the fact that the Respondent took no action until after receiving the January 29 memo reasonably suggests that, at the time it disciplined Hasan on February 1, the Respondent understood that both memos related to supervisory conduct affecting the employees. Consequently, we find that the cases cited by Member Brame in his dissent do not support a finding that Hasan's discharge was lawful.

[19] Because the memos of January 17 and 29 are inextricably intertwined, we find it unnecessary to resolve the discrepancy in the testimony as to which of the memos Loehrke expressed her annoyance with at the February 1 meeting with Hasan.

referred to concerns the Respondent had raised about Hasan's conduct over the past 9 months, and during this period Hasan had angered the Respondent by protesting the written warnings placed into his and Borgs' personnel files. We agree with the judge that this conduct by Hasan constituted protected activity. Thus, it is clear that the Respondent's animus towards Hasan's protected activity was a motivating factor in its decision to terminate him. Accordingly, we find that General Counsel has established a prima facie case under *Wright Line* that Hasan's discharge was unlawful.

We further find that the Respondent has failed to sustain its burden under *Wright Line* of showing that it would have discharged Hasan even absent his protected concerted activity. The Respondent contends that it discharged Hasan because he refused to sign the statement of personal project objectives Berger gave him. It is apparent, though, that the discharge was not solely due to the failure to sign the performance objectives, but rather was linked to the Respondent's anger at Hasan for his protected activity, especially his involvement with the January 17 memo. Indeed, Loehrke testified that the failure to sign was the "final straw" for her. Further, as noted above, Hasan was warned that *any* future acts of misconduct would result in his discharge, thus further suggesting that the failure to sign would not, by itself, warrant discharge. Moreover, we note that Hasan's termination letter made no reference to the failure to sign the performance objectives, thus casting further doubt as to whether the Respondent was actually discharging him for that reason, as it contends. In view of these facts, we are unable to conclude that the Respondent would have discharged Hasan in the absence of his protected activity, and accordingly find that its discharge of Hasan violated Section 8(a)(1) of the Act.

ORDER

The Respondent, Epilepsy Foundation of Northeast Ohio, Cleveland, Ohio, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning concerted activity protected by the Act.

(b) Issuing disciplinary warnings to employees for disclosing or discussing their wages with other employees.

(c) Threatening employees with reprisals for disclosing or discussing their wages with other employees.

(d) Maintaining a rule prohibiting employees from disclosing or discussing their wages with other employees.

(e) Issuing disciplinary warnings to employees for engaging in protected concerted activities.

(f) Discharging employees for engaging in protected concerted activities.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its policy prohibiting employees from discussing their wages with other employees.

(b) Within 14 days from the date of this Order, offer Arnis Borgs and Ashraful Hasan full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Arnis Borgs and Ashraful Hasan whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings and discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the warnings and discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Cleveland, Ohio, copies of the attached notice marked "Appendix"[20] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to ensure that the notices are not altered, defaced, or covered by any other

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[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed down the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 28, 1995.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 10, 2000

John C. Truesdale	Chairman
Sarah M. Fox	Member
Wilma B. Liebman	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HURTGEN, dissenting in part.

In *E.I. Dupont & Co.*, 289 NLRB 627 (1988), the Board held that *Weingarten* [1] rights do not apply to employees in nonunion facilities. This principle has been followed since that time, and no court has disagreed with it. Nor is there a showing that the principle has led to industrial strife. Despite all of this, my colleagues now abruptly reverse precedent and apply *Weingarten* to non-union facilities. By so doing, they take away from a nonunion employer its heretofore unfettered right under the Act to deal individually with its employees.

Initially, I note that there are values in having laws that are stable, predictable and certain. Thus, we should not reverse important legal doctrine in the absence of compelling considerations for doing so.

In finding such compelling considerations, the majority says that extant law "infringes upon Section 7 rights and is inconsistent both with Supreme Court precedent and the policies of the Act." I disagree. As discussed below, Section 7, at most, protects nonunion employees in their *seeking* assistance at an investigatory interview.[2] Section 7 does not require the employer to *accede* to that request. As also discussed below, neither Supreme Court precedent nor the Act compels the employer to accede to the request. Thus, the employer has a right to decline the request, and to proceed with the interview with the employee alone. If the employee refuses to be interviewed, he/she is insubordinate and can be disciplined for such insubordination.

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[1] 420 U.S. 251 (1975).

[2] The term "interview", as used herein, is used in its *Weingarten*, sense, *i.e.*, an investigatory interview of an employee in circumstances which reasonably lead the employee to believe that discipline might result.

To the extent that there are compelling considerations, they point toward preserving the status quo. These considerations are set forth in *Dupont*, and there is no need to repeat them here. I need add only a few further thoughts, and a refutation of the arguments of my colleagues.

First, let us be clear that the issue is *not* whether an employee has a Section 7 right *to seek* the assistance of a co-employee at an investigatory interview. I assume arguendo that there is a Section 7 right to seek such mutual aid or protection, and that an employer therefore could not discharge an employee for seeking that assistance. However, the issue here is whether the employer is *obligated to grant* the employee's request. That is, does federal law forbid a nonunion employer from dealing individually with an employee during an interview with that employee? Phrased differently, does the employer violate the Act if the employer requires the employee to attend the interview by himself, and discharge the employee for insubordination if he refuses? In *Dupont*, those questions were answered in the negative, and my colleagues would now answer them in the affirmative.

The current law is well grounded in *Weingarten* itself. As noted above, the Supreme Court held that, in a unionized setting, the employee is entitled to union representation at the interview. The Court's rationale is instructive:

> The union representative whose participation [the employee] seeks is however safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly.

Clearly, in a unionized setting, the "union representative" is charged with "safeguarding . . . the interests of the entire bargaining unit". Equally clearly, in a nonunion setting, there

is no "union representative", and there is no "bargaining unit". Thus, it is plain that the Court in *Weingarten* did not envisage rights to representation in a nonunion setting.

Further, the differences between a unionized work force and a nonunion workforce are clear and obvious. The employer in the former situation acts at its peril when it deals directly with an employee with respect to an employment-related matter. By contrast, in a nonunion setting, the employer is completely free under the Act to deal with an individual employee as it wishes.[3] My colleagues have now obliterated that clear line. They forbid the nonunion employer from exercising its management right to interview an employee on an individual basis.

There is another difference between a unionized context and a nonunion context. As the Court noted in *Weingarten*, the presence of a union representative in a unionized context may actually help the interview process. The union representative knows the discipline provisions of the collective-bargaining agreement, and can offer those relevant insights at the interview. Also, the union representative knows the grievance-arbitration provisions of the agreement, and can apprise the employer of the risks that it faces if discipline is imposed.

None of this is true in a nonunion setting. There is no collective-bargaining agreement, and there is no grievance-arbitration provision under such an agreement. Of course, this is not to say that an employee-assistant in a nonunion setting would be unintelligent or unhelpful. It is simply to recognize that such an assistant is not offering the same insights as does a union representative who operates under a union contract containing discipline provisions and grievance-arbitration procedures.

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[3] *See Linden Lumber v. NLRB*, 419 U.S. 301 (1974); *J.I. Case v. NLRB*, 321 U.S. 332 (1944).

My colleagues have altered the delicate balance achieved in *Weingarten*. That balance involves the "difficult and delicate responsibility of reconciling conflicting interests of labor and management." [4] More particularly, the balance is between the individual employee's interest in assistance at the interview and the employer's interest in having an unfettered investigation of allegations of misconduct.

In striking that balance, the Court noted, inter alia, the unions' interest in representing all of the unit employees, the expertise and special knowledge of the union representative, and the industrial practice under which many collective-bargaining agreements contain "*Weingarten*—type" provisions. Of course, none of these factors is present in a nonunion situation. Thus, the delicate balance in favor of representational assistance in a unionized situation tilts decidedly the other way in a nonunion situation.

Moreover, by grafting the representational rights of the unionized setting onto the nonunion workplace, employers who are legitimately pursuing investigations of employee conduct will face an unknown trip-wire placed there by the Board. Employers in a nonunion setting will generally be completely unaware of this right to representation that the Board is imposing on them. The workplace has become a garden of litigation and the Board is adding another cause of action to flower therein, but hiding in the weeds.

Finally, my colleagues assert that it is speculative to say that the presence of a third party would impair the interview. In this regard, my colleagues have missed the point. In a nonunion setting, *the employer* makes the judgment as to whether the interview would be enhanced or impaired by the presence of a third party. If the employer makes the judgment that the interview would be impaired, it is not the role of the Government to say that this judgment is incorrect.

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[4] *Weingarten* at 267.

The same point obtains with respect to the majority's assertion that the employer is free to forego the interview. Again, if the employer makes the judgment that an interview is more helpful than a non-interview (in terms of ascertaining facts), that is a judgement for the employer to make.

For all of the foregoing reasons, I would uphold extant law, and find no violation.[5] In addition, even if extant law is now changed (as it is by my colleagues), it is most unfair to apply the new law to Respondent in this case. The Respondent acted consistently with extant law when it denied Borgs' request for representation. Rather, it was Borgs who acted contrary to legal principles when he insisted on representation. In these circumstances, it is "manifestly unjust" to now say that Respondent was the one who acted unlawfully.[6]

Discharge of Hasan

I agree with the judge that the discharge of Hasan was lawful. The judge found, as a fact, that Hasan was discharged because of the January 17 memo from Hasan and Borgs to Berger (copy to Executive Director Loehrke). The judge also found, as a matter of law, that the memo was unprotected. Clearly, the judge was correct. The memo sought the dismissal of Berger as a supervisor. The act of seeking the dismissal of a supervisor is unprotected, unless there is a showing that the dismissal is sought as a means of rectifying supervisory conduct which has a direct adverse impact on the employee's terms and conditions of employment.[7] Here, the memo did not even mention any adverse impact of Berger's

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[5] I do not pass on the issue of whether the Act compels the result that I have reached. *See Slaughter v. NLRB*, 876 F.2d 11 (1986) (the court said that Board erroneously assumed that the Act mandated this result). Rather, I simply conclude that the policies of the Act strongly militate in favor of that result.

[6] *NLRB v. Bufco Corp.*, 899 F.2d 608 (7th Cir. 1990).

[7] *See Lutheran Social Services*, 250 NLRB 35, 41 (1980).

conduct. It simply declared that Berger's supervision was no longer required. Indeed, the memo expressed gratitude for Berger's past services.

My colleagues misread my position with respect to the January 17 memo. I am not saying that the letter seeking the supervisor's discharge must itself refer specifically to the manner in which the supervisor affects employees. Rather, I am saying that the General Counsel must establish, *in some fashion*, that supervisory conduct affected the employees, and that this was the reason for their seeking the discharge of the supervisor. In the instant case, this showing is not made in either the January 17 memo or in any other way.

Hoytuck, 285 NLRB 904 (1987), and *Lutheran Social Services, supra*, support my position. In *Hoytuck*, the Board held that the employee complaints against the supervisor were protected "because it is evident that . . . [the supervisor's] conduct had an impact on employee working conditions". The same point is made in *Lutheran Social Services, supra*. The employee activity against supervisors was unprotected because "employees were protesting management policies that did not directly affect them as employees." [8]

In sum, the January 17 memo was unprotected because it sought the discharge of supervisor Berger. There is no showing that the effort to discharge the supervisor was prompted by supervisory conduct affecting employees' terms and conditions of employment. The January 17 memo did not become protected by reason of the later memo of January 29. The Respondent was critical of the January 17 memo, and thus Hasan and Borgs wrote another memo on January 29. As the judge correctly found, this memo was simply an after-the-fact attempt at damage control. In any event, the January 29

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[8] With respect to *Caterpillar*, 321 NLRB 1178, 1179 (1996), I do not agree with the decision in that case, and I note that the decision was vacated.

letter did not raise the anger of the Respondent. Indeed, the Respondent, through Loehrke, met with Hasan to discuss that memo. It was the January 17 letter that raised the anger of Respondent, and that letter was unprotected.

Finally, although Hasan may have engaged in earlier protected activities, the judge found that they were not the cause of the discharge. Indeed as my colleagues concede, the discharge was linked to the Respondent's anger over the January 17 memo.

Dated, Washington, D.C. July 10, 2000

Peter J. Hurtgen Member

NATIONAL LABOR RELATIONS BOARD

MEMBER BRAME, dissenting in part.[1]

I.

A. Introduction

This case presents the Board with yet another opportunity to consider whether the right of unionized employees to have a union representative present, on request, at investigatory interviews with employers should be extended to the non-unionized workplace.[2] The General Counsel has requested that the Board overrule its most recent decision in this area, holding that nonunionized employees do not enjoy such a right,[3] and return to a past interpretation of the Act, which would bestow this right on such unrepresented employees.[4] My colleagues in the majority have decided to do just that. The National Labor Relations Act (hereinafter "the NLRA" or "the Act), however, does not provide for such protection for nonunionized employees, and to interpret it in such a way both disrupts the balance between the powers of labor and

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[1] I join my colleagues in affirming the finding of 8(a)(1) violations to which no exceptions were filed, including violations based on the Respondent's coercive interrogation of employee Arnis Borgs, its issuing of disciplinary warnings and threats to Borgs for his discussion of wage information with other employees, and its promulgation of a rule that prohibited employees from discussing wage information with other employees.

[2] This right in the unionized setting was approved by the United States Supreme Court in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). There, the Court defined an "investigatory interview" as an interview with the employer that the employee reasonably believes may result in his or her discipline. *Id.* at 256 (*citing Quality Mfg. Co.*, 195 NLRB 197 (1972); *Mobil Oil Corp.*, 196 NLRB 1052 (1972)).

[3] *E.I. DuPont & Co.*, 289 NLRB 627 (1988), *review denied sub nom. Slaughter v. NLRB*, 876 F.2d 11 (3d Cir. 1989).

[4] *Materials Research Corp.*, 262 NLRB 1010 (1982).

management struck by Congress in the Act and the balance struck by this Board in its long history of interpreting the Act.

Finding an 8(a)(1) [5] violation by the Respondent in this case for its discharge of an employee who refused to meet with his supervisors without a coworker present creates a representational right in employees who have not made the choice to be represented by a union. This decision endows nonunionized employees with a right of representation in one specific situation, although they have not elected a union to represent them in any of their other dealings with management. Such a grant of rights wreaks havoc with the scheme created by the Act, and a proper interpretation of the Act would require a finding that such unrepresented employees are not entitled to a special right of representation in this one situation. Forcing a nonunionized employer to deal with an employee representative, when it is properly free to deal individually with its unrepresented employees with regard to all other terms and conditions of employment, is simply an incorrect interpretation of the Act. The mere fact that unionized employees enjoy a Section 7 right to act in concert for mutual aid or protection by having a union representative at investigatory interviews upon request does not mean that unrepresented employees enjoy the same right. As explained

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[5] Sec. 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. Sec. 158(a)(1). Sec. 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this title.

29 U.S.C. Sec. 157.

in detail below, the scope of Section 7 rights can and does vary based on whether employees are unionized.

Additionally, even if my colleagues' approach were a permissible interpretation of the Act, it is not a reasonable one. As explained in detail below, there are very specific reasons for allowing organized employees to have a union representative present at investigatory interviews that employees reasonably believe may result in discipline. Such a union representative is knowledgeable and experienced and has the ability to help both the individual employee and the employer as well as the ability to safeguard the interests of the entire bargaining unit. A mere coworker brings few if any of the same qualities to the table. Because I do not think that the majority's interpretation of the Act is a correct one or a reasonable one, I dissent from their decision to return to what I believe to be an unsound rule.

My colleagues in the majority would also find that the second discharge at issue in this case violated Section 8(a)(1). I cannot agree with this decision either. The second discharge resulted from an employee's attempt to remove his supervisor. Such conduct, even when concerted, is not protected unless the employee is protesting activity by a supervisor that has a direct impact on the employee's working conditions. Here, the protest at issue, a memo sent to the supervisor, referenced no supervisory conduct whatsoever, but merely asserted that the supervisor was no longer necessary. Because an attempt to remove a supervisor is not protected activity, I must dissent from my colleagues' determination that the Respondent violated the Act when it discharged this second employee.

B. The Facts and Findings

In 1993, The Epilepsy Foundation of America ("EFA") selected the Respondent, an EFA affiliate, to conduct a three-year project related to school-to-work transitions for

teenagers with epilepsy (hereinafter "the project"). The Respondent's Executive Director, Christine Loehrke, was responsible for overseeing the project, and Respondent's Director of Vocational Services, Rick Berger, acted as the project's on-site supervisor. The two employees at issue in this case are Dr. Ashraful Hasan, a full-time Transition Specialist on the project, and Arnis Borgs, an Employment Specialist.

During 1995 and 1996, Hasan and Borgs engaged in certain conduct that is at issue in this case. First, between August and December 1995, they took part in a Brown Bag Lunch program through which employees met approximately six times during lunch hours to talk about issues that concerned them. Also, in November 1995, Borgs and Hasan initiated an Ethics Committee, which met twice and gave employees a chance to address problems with employee relations and client-service delivery.

On June 7, 1995, Supervisor Berger wrote a memorandum regarding an incident involving Hasan, Borgs, and an interpreter and stating that Hasan and Borgs had been given verbal warnings for their conduct in relation to that incident.[6] Hasan and Borgs claim that they discussed the incident with Berger, who told them that nothing negative would be placed in their personnel files. However, Hasan later found the warning memo in his file. In response, Hasan wrote a memo to Berger with copies to Loehrke and Borgs. Berger prepared a memo in response, apparently with Loehrke's assistance, which criticized the "insubordinate tone" that Hasan had employed in his memo and complained about Hasan's having undermined Berger's supervision of Borgs by sending Borgs a copy.

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[6] The precise details regarding this incident are not relevant to the issues in this case.

With this background, Hasan and Borgs then engaged in the conduct most directly relevant to the discharges in this case. On January 17, 1996, Hasan and Borgs prepared and sent a memo to Berger, which stated that his supervision of the project was no longer required.[7] They also sent a copy of the memo to Loehrke, although she was away from the office at the time. Upon learning that Berger and Loehrke were displeased with this January 17 memo, Hasan and Borgs, on January 29, submitted an eight-page memo to Loehrke, the stated intention of which was "to elaborate upon the reasons underlying" the January 17 memo. This January 29 memo detailed Hasan's and Borgs's alleged concerns about Berger.

Thereafter, on February 1, 1996, Berger informed Hasan and Borgs that Loehrke wanted to meet with each of them individually with Berger present. Hasan informed Berger that they were in the midst of a meeting and could not meet with Loehrke at that time. Loehrke herself then came to Hasan and Borgs and told them that they must meet with her and Berger. When Loehrke informed Borgs that he must meet with them,

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[7] The memo stated:

> Mr. Jim Troxell [an EFA representative monitoring the project] and Dr. Bob Fraser [responsible for providing data processing and analytical services to the project] have continued to provide supervisory input pertaining to service delivery and the research component of the study. During the past several months, Ms. Christine Loehrke has also provided input and assistance to the NIDRR [National Institute of Disability and Rehabilitation Research, responsible for the research grant] School-to-Work Project.
>
> As mentioned during earlier discussions (albeit brief) with you, both Dr. Ashraful Hasan and Mr. Arnis Borgs reiterate that your supervision of the program operations performed by them is not required.
>
> Your input to the NIDRR project in the past is appreciated. At this stage, the major area which has to be addressed-deals with outreach. Only support staff assistance is needed in this regard.

he refused and said that he would meet alone with Loehrke but not with both Loehrke and Berger. Loehrke informed Borgs that he must meet with both of them together. Borgs then asked if Hasan could attend the meeting with him, but Loehrke rejected his request. When Borgs continued to refuse to meet alone with Loehrke and Berger, Loehrke told him to go home for the remainder of the day and to return the next morning. Borgs was then told to surrender his key to the office and was escorted out of the building.

When he returned the next day, Borgs met with Loehrke and Jim Wilson, the Respondent's Director of Administration. At that time, Loehrke informed him that his refusal to meet with her and Berger the previous day was gross insubordination and that he was terminated from employment. Borgs was also given a termination letter, which described his "gross insubordination" in failing to meet with Loehrke and Berger, noted that his involvement in the January 17 memo demonstrated an unwillingness to accept supervision, and explained that he had "fail[ed] to build constructive work relationships with management personnel" and had demonstrated a "resistance to accept[ing] responsebility for attempting to attain articulated performance goals."

Unlike Borgs, Hasan did meet with Loehrke and Berger on February 1. At that time, Loehrke expressed her unhappiness with the January 17 memo,[8] and Hasan told her that the memo was a needs assessment. Hasan also received a written warning, which stated that the January 17 memo constituted gross insubordination and that further acts of misconduct or insubordination would result in his immediate termination.

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[8] As my colleagues note, there is some confusion in the record as to whether Loehrke expressed her displeasure with the January 17 memo or both that memo and the January 29 memo at this meeting with Hasan and Berger.

Later, on March 25, Loehrke informed Hasan that he was terminated.[9] Hasan received a letter signed by Loehrke when he returned to pick up his belongings on March 29. The letter explained that he had been terminated as a result of his conduct over the previous nine months, specifically his refusal to accept supervision on the project and his confrontations with other staff members.

The General Counsel asserts that the Respondent discharged Borgs and Hasan because they had engaged in concerted activities and that the Respondent thereby violated Section 8(a)(1) of the Act. The judge indeed found that the Respondent did in fact discharge Borgs in retaliation for protected, concerted activities in which he had earlier engaged.[10] However, the judge also found that the Respondent would have proceeded with its discharge of Borgs even in the absence of his protected activities and that, therefore, the Respondent did not violate the Act when it terminated Borgs's employment. First, the judge found that the January 17 memo did not constitute protected, concerted activity and thus that discipline resulting from that memo was not a violation. Second, the judge determined that Borgs's refusal to meet with Loehrke and Berger upon request constituted insubordination for which he properly could be disciplined under the Act despite his request to have Hasan present at the meeting.

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[9] Although Hasan testified that he was given no reason at this time for his termination, Loehrke's notes indicate that she did raise with him an incident that occurred earlier in March in which Hasan failed to sign performance objectives given to him by Berger. Hasan apparently did not sign off on the objectives because he wanted to add his own hand-written comments to them.

[10] The activities that the judge found to be protected and concerted involved attempts by Borgs to convince the Respondent to increase the amount that it paid employees for mileage reimbursements and Borgs's discussions with other employees regarding salaries.

Similarly, the judge determined that Hasan's discharge did not violate the Act. First, the judge found that the General Counsel had failed to establish that the Respondent bore Hasan any animus based on his activities relating to the Brown Bag Lunch program, the Ethics Committee, or the interpreter incident. Additionally, the judge noted thatthese activities "were remote in time and unrelated to the events that led to [Hasan's] discharge." Second, the judge concluded that Hasan's part in the January 17 memo did not constitute protected, concerted activity as argued by the General Counsel. In this regard, the judge noted that the January 17 memo did no more than attempt to dismiss Berger as Hasan's and Borgs's supervisor and did not raise concerns about the project or Berger's supervision thereof. Additionally, the judge refused to accept Hasan's and Borgs's characterization of the January 17 memo as a needs assessment and instead found that that characterization as well as the detailed January 29 memo were in fact mere "after-the-fact attempts at damage control."

My colleagues find that both discharges at issue in this case violated Section 8(a)(1) of the Act. With regard to Borgs's discharge, my colleagues determine that his request to have Hasan present at the meeting with Loehrke and Berger was an exercise of his Section 7 rights [11] and that the Respondent's insistence that he meet without Hasan or be terminated restrained, interfered with, or coerced him in exercise thereof and thus violated Section 8(a)(1). In order to reach this finding, of course, my colleagues are forced to overrule Board precedent holding that unrepresented employees do not have a right to representation by a coworker at an investigatory interview with an employer even if they have a reasonable belief that the interview will result in disciplinary

[11] For the full text of Sec. 7, *see supra* fn. 5.

action. Because I find that the Act does not provide for such a right in unrepresented employees, I cannot join my colleagues' decision in this regard.

With respect to Hasan's discharge, my colleagues find that the Respondent violated Section 8(a)(1) because the January 17 memo was protected, concerted activity and additionally because that memo was "inextricably intertwined" with the January 29 memo, which clearly related to terms and conditions of employment. My colleagues therefore determine that the Respondent's animus toward Hasan's protected activity in writing the memos and in engaging in earlier concerted conduct with Borgs was the motivating factor behind its termination of his employment. Again, I cannot join in my colleagues' decision; I agree with the judge that the January 17 memo was not protected, concerted activity and that, therefore, Hasan's discharge, even if resulting from his involvement in the memo, was not violative of the Act.

II.

A. Borgs's Discharge

1. The *Weingarten* right

The issue of representation during investigatory interviews initially arose in cases involving unionized workforces. In 1975, the United States Supreme Court, in *NLRB v. J. Weingarten, Inc.*,[12] approved of the Board's approach to such cases. In *Weingarten*, the employer had called in an employee for questioning regarding allegations that she had taken money.[13] During the course of the questioning, the employee several times asked the manager to call in the union shop steward or another union representative, and the

[12] 420 U.S. 251 (1975).

[13] *Id.* at 254.

manager refused to do so.[14] The Supreme Court held that previous Board decisions finding that employees have a Section 7 right "to refuse to submit without union representation to an interview which [they] reasonably fear[] may result in [their] discipline"[15] set forth "a permissible construction of" Section 7's "concerted activities for . . . mutual aid or protection" language.[16]

In accepting the Board's construction of the Act in this regard, the Court laid out "the contours and limits of the statutory right" as established by the Board in previous cases.[17] The Court noted that the right of an employee to union representation upon request at an investigatory interview "inheres in § 7's guarantee of the right of employees to act in concert for mutual aid and protection."[18] The Court then went on to explain that this right to representation would arise only when an employee actually requests representation[19] and only when the employee has a reasonable belief that the investigation will result in some sort of disciplinary action.[20] The Court then explained the employer safeguards that the Board had built into the representational right: First, although an employer may not force an employee to take part in an interview without his or her union representative, the employer is free to refuse to conduct the interview with a union representative present and instead proceed with the investigation without interviewing

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[14] *Id.*

[15] *Id.* at 256 (*citing Quality Mfg. Co.*, 195 NLRB 197 (1972); *Mobil Oil Corp.*, 196 NLRB 1052 (1972)).

[16] *Id.* at 260.

[17] *Id.* at 256 (*citing Quality Mfg Co.*, 195 NLRB 197 (1972); *Mobil Oil Corp.*, 196 NLRB 1052 (1972)).

[18] *Id.*

[19] *Id.* at 257.

[20] *Id.* at 257-258.

the employee at all.[21] Second, the employer is not under any duty to engage in bargaining with a union representative who attends an investigatory interview.[22]

With these confines, previously limned by the Board, the Supreme Court accepted what has now become known as the *Weingarten* right of a represented employee to have present, upon request, a union representative at an investigatory interview with his or her employer. In the course of its opinion, the Supreme Court explained the relationship between this right and Section 7 of the Act. As the Court noted, when an employee seeks a union representative's assistance at an investigatory interview, his or her conduct "clearly falls within the literal wording of § 7" even though the employee may be the only person with "an immediate stake in the outcome" of the interview and even though he or she is seeking "aid or protection" against the possibility of *individual* discipline.[23] As the Court explained, the *union representative* from whom the individual employee seeks aid or protection is

> safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview.[24]

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[21] *Id.* at 258.

[22] *Id.* at 258-260.

[23] *Id.* at 260.

[24] *Id.* at 260-261 (footnote omitted). *See also id.* at 261 fn. 6 where the Court quoted the following from a law review article:

> The quantum of proof that the employer considers sufficient to support disciplinary action is of concern to the entire bargaining

The Court went on to explain that recognizing this *Weingarten* right effectuates one of the NLRA's most important purposes-eliminating the "'inequality of bargaining power between employees . . . and employers.'" [25] Additionally, the Court emphasized that recognizing this right at the time of an investigatory interview can benefit the employer as well as the employee, because "[a] knowledgeable union representative could . . . elicit[ ] favorable facts, and save the employer production time by getting to the bottom of the incident." [26] In this regard, the Court quoted favorably language noting that participation of a union representative could assist both parties by helping to clarify the situation, the facts, and any collective-bargaining agreement clause that might be in issue and by limiting the filing of grievances by encouraging discussion at this early stage.[27]

Finally, after reiterating that the Board's construction of the Act was an interpretation that was "at least permissible," although perhaps not required, and that the Board had "engage[d] in the 'difficult and delicate responsibility' of reconciling conflicting interests of labor and management," the *Weingarten* Court noted that the right at issue was "in full

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> unit. A slow accretion of custom and practice may come to control the handling of disciplinary disputes. If, for example, the employer adopts a practice of considering [a] foreman's unsubstantiated statements sufficient to support disciplinary action, employee protection against unwarranted punishment is affected. The presence of a union steward allows protection of this interest by the bargaining representative.

Id. (quoting Comment, *Union Presence in Disciplinary Meetings*, 41 U. Chi. L. Rev. 329, 338 (1974)).

[25] *Id.* at 261-262 (*quoting* 29 U.S.C. Sec. 151).

[26] *Id.* at 262-263.

[27] *Id.* at 262-263 fn. 7 (quoting *Independent Lock Co.*, 30 Lab. Arb. 744, 746 (1958); *Caterpillar Tractor Co.*, 44 Lab. Arb. 647, 651 (1965)).

harmony with actual industrial practice." [28] In this regard, the Court explained that many collective-bargaining agreements already contained provisions according employees this right to representation and that "a 'well-established current of arbitral authority'" had upheld such a right even when it was not explicitly provided for in a collective-bargaining agreement.[29]

2. Subsequent Developments

a. *Materials Research Corp. and extending the Weingarten right*

Since *Weingarten*, the Board has struggled with the issue of whether to extend the right approved in that case to a situation like the one in the present case in which an employee in a nonunionized workplace requests representation by a coworker at an investigatory interview with his or her employer. In 1982, the Board offered what appeared at the time to be its definitive answer to this issue. In *Materials Research Corp.*,[30] the Board for the first time explicitly found a right to representation by a coworker at an investigatory interview in a nonunionized workplace. The Board acknowledged that the Supreme Court's decision in *Weingarten* had referred only to *union* representatives but determined that that was due to the particular fact pattern under consideration there and not to any desire on the part of the Court to limit the right to such a setting.[31] The *Materials Research* majority reasoned that, because the *Weingarten* Court had grounded the representational right in employees' Section 7 rights,

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[28] *Id.* at 266-267 (quoting *NLRB v. Truck Drivers*, 353 U.S. 87, 96 (1957) (citations omitted).

[29] *Id.* at 267 (quoting *Chevron Chemical Co.*, 60 Lab. Arb. 1066, 1071 (1973)).

[30] 262 NLRB 1010 (1982).

[31] *Id.* at 1012.

nonunionized employees should be accorded the same right as, for the most part, Section 7 protections do not vary based on whether one is represented by a union.[32] The Board then pointed to its earlier decision in *Glomac Plastics, Inc.*,[33] a case not clearly involving unrepresented employees [34] but in which the Board nonetheless stated that "Section 7 rights are enjoyed by all employees and are in no wise dependent on union representation for their implementation.'" [35] The

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[32] *Id.* The Board also noted that in its pre-*Weingarten* decisions in *Quality Mfg. Co., 195 NLRB 197 (1972)*, and *Mobil Oil Corp.*, 196 NLRB 1052 (1972), in which the Board had recognized a right to union representation in investigatory interviews, it had also grounded the right in an employee's right under Sec. 7 to engage in concerted activity for mutual aid or protection. *Materials Research*, 262 NLRB at 1013.

[33] 234 NLRB 1309 (1978), *remanded* by 592 F.2d 94 (2d Cir. 1979), supplemented by 241 NLRB 348 (1979), *enfd.* 600 F.2d 3 (2d Cir. 1979).

[34] The situation at issue in *Glomac Plastics* fell somewhere between *Weingarten* and the circumstances of the present case. In *Glomac Plastics*, the employer refused an employee's request to have present at an investigatory interview a union negotiating committee member and disciplined the employee for refusing to take part in the interview without this representative. *Id.* at 1309. The situation was different from that of *Weingarten*, and yet was not the equivalent of the situation in *Materials Research* and the present case, because there was merely some controversy as to whether the workplace employees were in fact represented by a union. As the *Glomac Plastics* Board explained, the employer had refused to bargain in good faith with the union and had thereby deprived its employees of the benefits of union representation. Id. at 1310. Thus, although the employees in *Glomac Plastics* were not unrepresented to the extent of those in *Materials Research* or the present case, they were not enjoying the full benefits of the representative that they had chosen. Because of this circumstance, the *Glomac Plastics* Board did employ certain language in its decision that apparently relates to the situation of nonunionized employees; the *Materials Research* majority thus drew on this language in making its argument that nonunionized employees should enjoy a right equivalent to the *Weingarten* right of unionized employees.

[35] *Id.* (quoting *Glomac Plastics*, 234 NLRB at 1311).

Board further noted, again, that its decision in this regard was "buttressed" by Justice Powell's dissenting opinion in *Weingarten* and his statement therein that the representational right would exist in a nonunionized setting as well.[36]

The Board then held that *Weingarten* "compels" a finding that unrepresented employees have a right to have a coworker present at an investigatory interview.[37] In reaching this conclusion, the Materials Research majority noted specifically the following language from *Weingarten*:

> Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management."[38]

The majority then went on to explain that these considerations come into play regardless of whether an employee is represented by a union and that unrepresented employees may have an even greater need for support during an investigatory interview.[39] The majority explained that unrepresented employees are without the safeguards of a collective-bargaining agreement, which checks an employer's ability to act in an unjust or arbitrary way, and without the

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[36] *Id.* (citing *Glomac Plastics*, 234 NLRB at 1311, and quoting *Weingarten*, 420 U.S. at 270, n.1 (Powell, J., dissenting)).

[37] *Id.* at 1014.

[38] *Weingarten*, 420 U.S. at 262 (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965)), quoted in *Materials Research*, 262 NLRB at 1014.

[39] *Materials Research*, 262 NLRB at 1014 (citing *Glomac Plastics*, 234 NLRB at 1311). For an explanation of how Chairman Van de Water, in dissent, refuted the majority's use of this Supreme Court language, *see infra* note 45.

protections afforded by a grievance-arbitration procedure.[40] According to the *Materials Research* majority, therefore, unrepresented employees should be able to look to coworkers for assistance during an investigatory interview in order to counteract this imbalance of power between employers and unrepresented employees.[41]

Chairman Van de Water and Member Hunter both filed vigorous dissenting opinions in *Materials Research*. In his dissent, Chairman Van de Water pointed out initially that employers are not statutorily obligated to recognize a representative of their employees unless that representative had been recognized by the employer or certified by the Board and that, without a recognized or certified union, employers are free to deal with employees individually.[42] Conversely, when a union has been recognized or certified, an employer, under Section 9(a) of the Act, is required to deal with the union rather than with individual employees on matters related to terms and conditions of employment.[43] As

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[40] *Id.*

[41] *Id.*

[42] *Id.* at 1016 (citing *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944)).

[43] *Id.* at 1016-1017. As Chairman Van de Water explained, once unit employees have designated a bargaining representative and that representative has been recognized or certified, the employer is obligated under Sec. 9(a) to deal with the union as its employees' exclusive representative. *Id.* Under Sec. 8(d), the employer must "confer [with the union] in good faith with respect to wages, hours, and other terms and conditions of employment.'" *Id.* at 1017 (quoting 29 U.S.C. Sec. 158(d)). Additionally, it is an unfair labor practice under Section 8(a)(5) for the employer to refuse to deal with the union about these Sec. 8(d) matters. *Id.* In fact, once such an exclusive representative has been recognized or certified, the employer cannot deal individually with its employees but

Chairman Van de Water explained, previous cases, dealing with the right of unionized employees to representation at investigatory interviews, had recognized that an employer's refusal to allow an employee's request for a representative at such an interview frustrates the employee's right not to deal individually with the employer when the collective-bargaining relationship requires the employer to deal with the employee's representative.[44] Chairman Van de Water then noted that the Supreme Court's decision in *Weingarten* was also centered on the existence of a collective-bargaining relationship.[45]

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must instead, under Secs. 8(a)(5), 8(d), and 9(a), deal with them collectively through their union with regard to their terms and conditions of employment. *Id.*

[44] *Id.*

[45] *Id.* at 1018 (quoting *Weingarten*, 420 U.S. at 261-262). At this point in his dissent, Chairman Van de Water also criticized the majority's attempt to equate the situations of represented and unrepresented employees by asserting that concerns expressed by the *Weingarten* Court with regard to represented employees applied equally or with even more force to unrepresented employees. As explained supra, the *Materials Research* majority quoted language from *Weingarten* expressing the Supreme Court's concern that denying represented employees a right to have union representation at investigatory interviews would "perpetuate[] the inequality the Act was designed to eliminate" and would "bar[] recourse to the safeguards the Act provided 'to redress the perceived imbalance of economic power between labor and management.'" *Weingarten*, 420 U.S. at 262 (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965)), quoted in *Materials Research*, 262 NLRB at 1014. As explained, the *Materials Research* majority insisted that these same concerns supported extending the *Weingarten* right to unrepresented employees. 262 NLRB at 1014. Chairman Van de Water, however, explained that the purpose of the Act was not to improve employees' positions through any means possible but instead was to give employees the ability to improve their own positions through the selection of a collective-bargaining representative:

> My colleagues rely on this language from the *Weingarten* decision, asserting that the presence of a fellow employee at an

Chairman Van de Water went on to explain the repercussions that would result from finding a right to representation by a coworker at an investigatory interview. As Chairman Van de Water noted, the Supreme Court had described the role of a union representative in such a situation as someone who could "make proposals and suggestions to the employer concerning such things as alternative discipline and other possible avenues of investigation," and the Board had previously found that employers had to allow such representatives "to play an active role in the discussions."[46] According to the Chairman, this prescribed role of a *Weingarten* representative "is strikingly similar to the role of a labor organization in its dealings with an employer."[47] Chairman Van de Water felt that, by extending this role to a nonunionized employee's coworker, the *Materials Research* majority had succeeded in creating a hybrid relationship whose existence is justified solely by Section 7's call for employee mutual aid and protection. It is a relationship of

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investigatory interview serves to enhance employees' economic power *vis-a-vis* their employer. While they may be correct that their decision does improve the employees' position in the balance of power, the simple fact remains that Congress has declared that the means by which employees are to redress such economic imbalance is utilization of the Act's processes for majority selection of an exclusive collective-bargaining representative. No doubt, this Board could construct a myriad of rules which would enhance the position of employees. To do so, however, it would have to ignore the mandate of Congress as well as the Supreme Court's admonition that "the Act's provisions are not indefinitely elastic, content-free forms to be shaped in whatever manner the Board might think best conforms to the proper balance of bargaining power."

Id. at 1018 fn. 37 (quoting *American Ship Building Co. v. NLRB*, 380 U.S. at 310.

[46] *Id.* at 1019 (citing *Southwestern Bell Telephone Co.*, 251 NLRB 612 (1980)).

[47] *Id.*

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potential cost and limitations for the employer which exists without reference to other applicable provisions of the Act; one that exercises its powers without being subjected, in any way, to the responsibilities imposed upon other entities that exercise such powers; and it is a relationship to which the employer must render deference without being provided the normal safeguards which would otherwise be available.[48]

Chairman Van de Water next discussed how the *Materials Research* majority's application of the *Weingarten* right to a nonunionized setting altered the employer-employee relationship with regard to a single aspect of terms and conditions of employment, thereby requiring employers to deal differently with employees for purposes of investigatory interviews as compared to all other terms and conditions. In this regard, the Chairman explained that such things as discussions about changes in pay scales, safety matters, and hours of work all would relate to an employee's terms and conditions and could have an even greater negative impact on an individual employee than could some forms of discipline. Yet, as the Chairman explained, the *Materials Research* majority certainly would not require an employer, who wished to speak with an individual employee about such a matter, to allow that employee's request to have a coworker present or forego the discussion altogether.[49]

Finally, Chairman Van de Water went on to explain why Section 7's "mutual aid or protection" language by no means compels the *Material Research* majority's result. Employees' Section 7 rights are affected by whether or not they have selected an exclusive representative. For example, when employees have selected a representative, they are no longer free to deal with their employer on an individual basis, and

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[48] *Id.*

[49] *Id.*

the union is free to waive some employee rights.[50] On the other hand, once they have opted for a union's representation, employees gain the right to bargain collectively with their employer and to insist that any agreement that is reached be put in writing and signed.[51] Thus, endowing only represented employees with the *Weingarten* right to representation under Section 7 would not be anathema to other applications of Section 7. Furthermore, as Chairman Van de Water explained, the mere fact that employee conduct is an attempt to obtain mutual aid or protection does not mean that an employer must accede to the request.[52] To prove his point, the Chairman considered application of the *Materials Research* majority's reasoning in a situation other than the *Weingarten* scenario. As he explained, employees in a nonunionized workplace could come together and agree to ask the employer to submit workplace changes to an employee majority vote.[53]

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[50] *Id.* at 1020. In support of his assertion that the scope of Sec. 7 rights is affected by whether employees are represented, specifically in that unions may permissibly waive certain Section 7 rights, Chairman Van de Water pointed explicitly to the fact that when a union becomes the exclusive representative of a unit of employees, it is permitted to waive those employees' right to strike. *Id. See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983) ("This Court long had recognized that a union may waive a member's statutorily protected rights, including 'his right to strike during the contract term, and his right to refuse to cross a picket line.'") (quoting *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967)); *Plumbers & Pipefitters Local 520 v. NLRB*, 955 F.2d 744, 751 (D.C. Cir. 1992) ("[M]any of the rights guaranteed to employees by the NLRA may be altered or waived by a union in collective bargaining, so long as the union fulfills its duty of fair representation and takes no action that would impair the employees' choice of their bargaining representative.") (citing *Metropolitan Edison*, 460 U.S. at 705-707).

[51] *Id.*

[52] *Id.* (citing *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975) for the proposition that "not all concerted actions for mutual aid and protection are protected by our Act").

[53] *Id.*

This conduct would clearly be in pursuit of mutual aid or protection against the possibility of "arbitrary or onerous employer actions," and an employer would not be able to discipline the employees for merely making the *request*.[54] However, the employer would not violate the Act by refusing the request and proceeding with the implementation of workplace changes in its usual manner.[55] Chairman Van de Water then explained that the *Weingarten* situation in a nonunionized workplace should be treated in the same way, *i.e.*, "employees who request the presence of a fellow employee at an investigatory interview are seeking mutual aid and protection and an employer would violate the Act by punishing an employee for *seeking* that protection."[56] However, according to Chairman Van de Water, nothing in the Act would require the employer to accommodate the employee's request or forego the interview.[57]

As previously noted, Member Hunter also dissented from the *Materials Research* majority's determination that unrepresented employees enjoy a *Weingarten* right to representation. Member Hunter first noted, along the same lines as Chairman Van de Water, that the *Weingarten* decision itself was grounded in the collective-bargaining relationship and in the Court's concern for the bargaining representative's right to protect not only the interests of the individual employee but the interests of the entire unit, a concern not present in the nonunionized setting.[58] Member Hunter next turned to the "practical reasons" for refusing to extend *Weingarten* to the nonunionized setting. Member Hunter explained that, while the Supreme Court in *Weingarten* had focused on "the

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[54] *Id.*

[55] *Id.*

[56] *Id.* (emphasis in original).

[57] *Id.* at 1020-1021.

[58] *Id.* at 1021.

important role a knowledgeable union representative could play in assisting the employer by eliciting favor-able facts and the like," the same could not be said in the nonunionized setting. Instead,

> the employer in the nonunion situation is likely to find itself confronted by a "representative" who has few or even an absence of the skills or responsibilities that one would expect from a union steward. It must therefore deal with a person who has no experience in dealing with these situations and who, out of probable friendship for the interviewee, may be involved emotionally in the interview.[59]

Despite these two vigorous dissents, the *Materials Research* majority won the day and established a right in unrepresented employees to representation by a coworker at investigatory interviews. As explained below, however, the right was not long-lived.

b. Limiting the Weingarten Right

Just three years after its decision in *Materials Research*, the Board overruled that case and found that unrepresented employees do not enjoy a *Weingarten* right to representation. In *Sears, Roebuck & Co.*,[60] the Board "fully endorse[d] former Chairman Van de Water's dissenting opinion" in *Materials Research*.[61] The *Sears* Board explained that the Weingarten right is clearly appropriate in a unionized setting because, in such a workplace, the union has been "vested with the exclusive authority to represent unit employees and deal with the employer on *all* matters involving terms and conditions of employment, including . . . discipline."[62] Thus,

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[59] *Id.* at 1021.

[60] 274 NLRB 230 (1985).

[61] *Id.*

[62] *Id.* at 230-231 (emphasis in original).

when a unionized employer seeks to do something that will affect an employee's terms or conditions, it is not free to deal individually with the employee when that employee objects.[63] The situation is different, however, when the workforce is not unionized; in such a situation, "an employer is entirely free to deal with its employees on an individual, group, or wholesale basis" with regard to all terms and conditions, including discipline.[64] According to the *Sears* Board, the *Materials Research* decision required nonunionized employers to deal collectively with their employees, a result that "fundamentally alters our statutory scheme" and "wreaks havoc with fundamental provisions of the Act."[65]

The *Sears* Board then went on to reject the reasoning employed in *Materials Research*. In *Sears*, the Board explained that reliance on *Weingarten*'s basis in Section 7 was misplaced because "[t]he scope of Section 7's protections may vary depending on whether employees are represented or unrepresented."[66] Additionally, the *Sears* Board rejected the

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[63] *Id.* at 231.

[64] *Id.* (citing *Linden Lumber v. NLRB*, 419 U.S. 301 (1974); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *NLRB v. Jones & Laughlin*, 301 U.S. 1 (1937)).

[65] *Id.*

[66] *Id.* Here, *the Sears* Board, like Chairman Van de Water in his *Materials Research* dissent, relied on *Emporium Capwell* in which unionized employees picketed in an attempt to force their employer to deal with them rather than their union. *Id.* (citing *Emporium Capwell*, 420 U.S. 50 (1974)). The Supreme Court held that the discharges that resulted were lawful because "the employees' actions contravened the exclusivity provisions of Section 9." *Id.* The employees' actions, which were concerted, would have been protected under Section 7 if they had not been represented by a union, but "their rights in a unionized setting could not 'be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA.'" *Id.* (quoting *Emporium Capwell*, 420 U.S. at 69). According to the *Sears* Board, the same reasoning is applicable to the *Weingarten* question in a nonunionized setting: "The scope of Section

Materials Research Board's reliance on the fact that a *Weingarten* representative "is not cloaked with full collective-bargaining authority." [67] Although the *Sears* Board acknowledged that this was an accurate statement of the limitation placed on a *Weingarten* representative, it explained that "the representative *acts as a representative for the employee being interviewed and all other employees in the unit.*" [68] This fact, in addition to the Board's previous holding that *Weingarten* representatives must be allowed to speak and be free to make proposals or offer alternatives, constituted "'dealing with' the employer, and 'dealing with' an employer is a primary indicium of labor organization status as well as a traditional union function." [69] It would run "contrary to the

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7's protections may vary depending on whether employees are represented or unrepresented, and the Section 7 rights of one group cannot be mechanically transplanted to the other group at the expense of important statutory policies." *Id.*

[67] *Id.*

[68] *Id.* (emphasis in original).

[69] *Id.* at 232 (citing *Materials Research*, 262 NLRB at 1016 fn. 30, 1019 fn.40 and accompanying text (Chairman Van de Water, dissenting)). The Board has more recently reaffirmed the notion that "dealing with" is one of the primary factors indicative of labor-organization status. See *Polaroid Corp.*, 329 NLRB No. 47, slip op. at 1-2 (1999); *Electromation, Inc.*, 309 NLRB 990, 994-995 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994). Forcing an employer to meet with an employee representative as well as the employee whose behavior is at issue and endowing that representative with the right to speak and make proposals treads very close to the line of forcing an employer to deal with a "labor organization" that has not been certified or recognized as the exclusive representative of the unit employees. *See Polaroid*, 329 NLRB No. 47 slip op. at 2 ("The Board has explained that 'dealing with' contemplated 'a bilateral mechanism involving proposals from the employee committee . . . , coupled with real or apparent consideration of those proposals by management.'") (quoting *Electromation*, 309 NLRB at 995 fn. 21).

Act's exclusivity principle" to force a nonunionized employer "to recognize and deal with the equivalent of a union representative." [70]

Member Hunter filed a separate concurring opinion in *Sears* because he felt that the Act does not *compel* the *Sears* decision; rather, according to Member Hunter, extending *Weingarten* rights to nonunionized employees would be "a permissible but not a reasonable construction of the Act." [71] Member Hunter then went on to explain why, in his opinion, overturning *Materials Research* was the most reasonable approach. First, he pointed out that *Materials Research*, by equating the Section 7 rights of unionized and nonunionized employees, gave "representation to employees who have not chosen to be represented," despite the fact that employees' Section 7 rights can vary depending on whether they are represented by an exclusive bargaining agent.[72] Member Hunter went on to decry the *Materials Research* majority's "denigration" of "the knowledge, skill, and experience which the union representative typically brings to the investigatory interview" as well as its failure to take notice of the fact that a union representative is "charged with the concerns of the unit as a whole." [73] Member Hunter then went into some detail about how these differences in the unionized and nonunionized settings could affect the efficacy and role of a *Weingarten* representative:

> In the represented setting, the employer regularly deals with the union representative on matters besides the investigatory interview. There is more likelihood that the employer then will permit greater participation from the union representative at the investigatory interview

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 233-234.

[73] *Id.* at 234.

> because the employer knows that he may face the union representative again on this matter in a postdiscipline grievance or on other related matters. In addition, with the union representative, there is more impetus on the employer to make consistent disciplinary decisions because the union representative manifests an apparent solidarity of the employees in the unit. The presence of the union representative also has a beneficial effect for employers in that his presence may discourage frivolous grievances and reduce the costs of nonfrivolous grievances. . . . [I]n the unrepresented setting, there is an unlimited pool of potential witnesses at these interviews since the employee can choose any coworker he likes. This unlimited pool can hinder continuity and speedy investigations which the employer seeks.[74]

Because of these differences in the two settings, Member Hunter concurred in the *Sears* majority's decision to overturn *Materials Research*, despite his understanding that neither result was compelled by the Act or by *Weingarten*.

Three years after *Sears* was decided, Member Hunter's approach basically became the majority approach to the *Weingarten* question in the nonunionized setting. In *E.I. DuPont & Co.*,[75] the Board reconsidered *Sears* after a remand

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[74] *Id.*

[75] 289 NLRB 627 (1988), review denied sub nom. *Slaughter v. NLRB*, 876 F.2d 11 (3d Cir. 1989). The procedural history of this case is somewhat complicated. Initially, the Board affirmed the judge's determination that the employer had violated the Act by discharging an employee for refusing to take part in an investigatory interview without a coworker present. 262 NLRB 1028 (1982). The Third Circuit enforced the Board's decision. 724 F.2d 1061 (3d Cir. 1983). The Respondent then filed motions for panel rehearing and rehearing en banc, and the Board requested that the court vacate its decision and remand to the Board for further consideration. The court then granted panel rehearing, vacated its opinion, 724 F.2d 1061 (3d Cir. 1984), and remanded to the Board, 733 F.2d 296 (3d Cir. 1984). The Board proceeded to issue a supplemental

from the Third Circuit in which the court held that "the Board erroneously assumed that the Act mandated its interpretation" and directed the Board to consider whether "it would be a *permissible* interpretation of the Act to conclude that unrepresented employees are not entitled to the presence of a coemployee during an investigatory interview."[76] In *DuPont*, the Board proceeded to overrule that part of *Sears* that held that the Act compelled the finding that unrepresented employees do not enjoy a *Weingarten* right to representation by a coworker at an investigatory interview.[77] Rather, the *DuPont* Board held that, although the *Materials Research* decision might have been a permissible interpretation of the Act,[78] the proper balance between labor and management's conflicting interests is "better served" by not extending the *Weingarten* right to the nonunionized workplace.[79]

The Board considered the factors that supported the different balance struck in *Weingarten* itself and how these factors fared in the nonunionized workplace. While the *Weingarten* Court had emphasized the fact that a union representative could safeguard the interests of the entire bargaining unit in addition to those of the individual employee, the Board explained that there is no such guarantee in the nonunionized workplace.[80] Similarly, a coworker would be less likely than a union representative to be able to

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decision in which it reversed the judge and found, based on *Sears*, that the employer had not violated the Act. 274 NLRB 1104 (1985). Finally, the Third Circuit remanded the case because it determined that the Board should not have assumed that the Act mandated the *Sears* interpretation. 794 F.2d 120 (3d Cir. 1986).

[76] 289 NLRB at 627 (emphasis added).

[77] *Id.* at 628.

[78] *Id.*

[79] *Id.* at 630.

[80] *Id.* at 629.

keep an employer from engaging in unjust conduct, because there would not be a collective-bargaining agreement to define misconduct and how to ameliorate it and because the coworker probably would not have access to information about how other employees had been treated under similar circumstances.[81]

The *DuPont* Board then went on to explain that a *Weingarten* representative in a nonunionized setting would also be less helpful to an employer than would a union representative. While a union representative may assist the employer by helping to elicit facts and to speed things along, such assistance from a fellow employee would be less likely, because such a fellow employee would probably have no experience with such interviews and might be emotionally involved in the outcome due to his or her relationship with the interviewee.[82] Similarly, the likelihood of "heading off formal grievances," a factor weighing in favor of the presence of a union representative, would not come into play in a nonunionized workplace where no collective-bargaining agreement would provide for formal grievance procedures.[83]

The *DuPont* Board then proceeded to consider the situation that would arise if an employer decided, as is its prerogative under *Weingarten*, that, rather than have a representative present, it would prefer to forego the interview altogether. In a unionized workplace, although the employee would lose the opportunity to explain the incident at issue, if discipline resulted, the employee would still be able to avail himself or herself of whatever grievance procedures had been provided through the collective-bargaining process.[84] An employee in a

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[81] *Id.*

[82] *Id.* at 629-630 (quoting *Materials Research*, 262 NLRB at 1021 (Member Hunter, dissenting)).

[83] *Id.* at 630.

[84] *Id.*

nonunionized workplace, however, would have no such safeguard. Thus, as the Board explained:

> To the extent that recognition of a nonunion *Weingarten* right induces employees to insist on a condition that may in turn induce employers simply to cancel investigatory interviews (unless the employee waives his *Weingarten* right), there is a serious question whether extending the right to nonunion employees may not work as much to their disadvantage as to their advantage.[85]

In light of all of these factors, the *DuPont* Board determined that it would "best effectuate the purposes of the Act" by endowing only unionized employees with the right to a *Weingarten* representative on request.[86] The Board did note that it was not implying that a nonunion employee does not have a right to make a *request* for representation at an investigatory interview.[87]

3. Should *Weingarten* Now Be Re-Extended?

With this background, the issue of *Weingarten* representation in nonunionized workplaces has arisen again, and today, my colleagues in the majority decide once again to move away from *Sears* and *DuPont* and back to *Materials Research* and find that the Respondent in this case has violated Section 8(a)(1) by discharging Borgs for refusing to meet with Loehrke and Berger in the absence of his coworker Hasan. I, however, would find that the Respondent has not violated the Act, because nonunionized employees do not enjoy a *Weingarten* right to representation by a coworker. Furthermore, I would return to *Sears* and find that this conclusion is compelled by the Act.

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[85] *Id.*

[86] *Id.* at 631.

[87] *Id.* at 630 fn. 15.

As explained in detail above and in both Chairman Van de Water's dissenting opinion in *Materials Research* [88] and the *Sears* opinion,[89] a nonunionized employer is under no duty to recognize an employee representative until it has achieved recognitional status satisfactory to the employer or has been certified by the Board.[90] Prior to this recognition or certification, a nonunionized employer may deal on an individual basis with its employees with regard to all terms and conditions of employment. By finding that nonunionized employees have a *Weingarten* right to representation during investigatory interviews, my colleagues carve out an area in

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[88] 262 NLRB at 1016-1019.

[89] 274 NLRB at 230-231.

[90] Once a majority of employees in an appropriate unit has properly selected a representative, an employer becomes obligated to bargain with that representative instead of with individual employees. For example, Sec. 9(a) of the Act provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the *exclusive representatives of all the employees in such unit* for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective- bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment

29 U.S.C. Sec. 159(a) (emphasis added).

Additionally, Sec. 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees, subject to the provisions of Section 9(a)." 29 U.S.C. Sec. 158(a)(5).

which they force nonunionized employers to deal collectively with employees, a result that is completely at odds with the intent and structure of the Act.

My colleagues' reliance on the applicability of Section 7 rights to nonunionized as well as unionized employees is misplaced. As explained above, the scope of Section 7 rights can and does vary depending on whether employees have a recognized or certified exclusive bargaining representative. Here, nonunionized employees would clearly have the right to *request* that a coworker attend an investigatory interview,[91] but their employers just as clearly are permitted to deny that request. Any other result creates a situation in which nonunionized employers, who have no duty to bargain or deal with an employee representative with regard to any other terms and conditions of employment, are burdened with this duty in one particular situation, that of investigatory interviews that may result in discipline.[92] My colleagues offer

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[91] As explained above, Chairman Van de Water also alluded to an employee's right to *request* representation. He noted that employees can engage in conduct that is an attempt to obtain mutual aid or protection, such as requesting a *Weingarten* representative, and that employers cannot discipline them for making such a request. *Materials Research*, 262 NLRB at 1020. He went on, however, to explain that the mere fact that an employee attempts to obtain mutual aid or protection does not mean that an employer is required to accede to the employee's request. *Id. See also supra* text accompanying notes 52-55.

[92] Although my colleagues characterize my argument as stating that extending the *Weingarten* right to the instant situation forces an employer to deal with the equivalent of a labor organization, I do not find that coworker-representatives are *necessarily* the equivalent of a labor organization. What my colleagues decide in this case, however, treads very close to the line of forcing employers to "deal with" the equivalent of a "labor organization" that has not been certified or recognized, as explained supra note 69. My colleagues' decision places this burden on nonunionized employers in one particularized situation and no other. It is no answer to argue, as my colleagues do, "that an employer is completely free to forego the investigatory interview" and thus has no obligation to

no explanation as to why this one situation should be treated any differently from a myriad of other situations in which an individual nonunionized employee may request the presence of a coworker at a meeting with the employer that is related to any term or condition of employment. Do nonunionized employees then have a right to insist on such representation when their employer wishes to discuss compensation or work hours with them individually? To so hold would obviously alter the structure of our Act and our longstanding interpretation of it.[93] It makes no more sense to carve out this term or condition of employment and endow nonunionized employees with a right to representation in the particularized situation of investigatory interviews.[94]

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deal with the employee's coworker-representative. The fact of the matter is that if the employer wants to get to the bottom of a situation with an employee by questioning that employee, something that it would be perfectly free to do with regard to any other term or condition of employment, it *does* have an obligation to deal with that employee's coworker-representative. In this regard, the nonunionized employer has entirely the same obligation as a unionized employer, even though its employees have not chosen to be represented by a collective-bargaining representative.

[93] My colleagues, like the *Materials Research* majority, assert that unrepresented employees need the assistance and support of a fellow employee in the investigatory-interview situation. This assertion, however, is driven neither by the statute nor by its legislative history. My colleagues are treating a presumed need as a statutory mandate. Our job, however, is to administer the Act that Congress passed, and nothing in that statute nor the legislative history justifies creating this one exception to our usual treatment of unorganized employees in the exercise of their Sec. 7 rights. My colleagues' approach treats the Act as infinitely elastic without any statutory authorization.

[94] In response to the question why nonunionized employees should be entitled to a coworker-representative at investigatory interviews but not at other meetings with their employers, my colleagues state that the principles put forward by the Supreme Court in *Weingarten* "speak only to this specific right" and that therefore other circumstances are not "encompassed within the *Weingarten* rationale" and are not before the Board today. This argument does not even begin to answer the question

Although I think that it is clear that the Act compels a finding that nonunionized employees are not entitled to a *Weingarten* right, I think that it is equally clear that, even if this result were not compelled, it is the better approach because it more properly balances the interests of labor and management. First, as Member Hunter noted in his dissenting opinion in *Materials Research*[95] and as explained by the Board in *DuPont*,[96] a coworker-representative does not bring the same level of assistance to an investigatory interview as does a union representative. As explained above, a union representative serves the interests of both employee and employer at an investigatory interview by eliciting facts and

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posed, however. Of course these other nonunionized-workplace situations are not "encompassed within the *Weingarten* rationale"; *Weingarten*'s rationale relates exclusively to *union* representation at investigatory interviews—unionized employees clearly already have a right to be represented with regard to changes in other terms and conditions of employment.

Additionally, although these other situations involving meetings between nonunionized employers and employees are not explicitly raised in this particular case, to the extent that these other situations demonstrate the difficulties with extending the *Weingarten* right to the nonunionized setting, they are before the Board today. My colleagues avoid the issue because there is no logical reason for extending nonunionized employees a representational right in the investigatory-interview situation and no other. However, if my colleagues were to acknowledge this fact, they would have to find that nonunionized employees have a right to at least this limited *Weingarten*-type representation at any meeting with an employer in which terms and conditions of employment may be affected, despite the fact that they are not represented by a certified or recognized union. In fact, logically extended, my colleagues' reasoning would result in a greatly reduced need for employees to avail themselves of the Act's processes relating to certification of a bargaining representative, because they would already have the right to at least limited representation in virtually every situation in which terms and conditions of employment may be affected.

[95] 262 NLRB at 1021.

[96] 289 NLRB at 628-630.

helping to avoid the filing of frivolous grievances. A coworker-representative, however, is less likely to have experience with such interviews and, as Member Hunter has noted, may be emotionally involved.[97] My colleagues in the majority respond to these concerns by asserting that they are "wholly speculative." It seems more speculative, however, to assume that a lone individual, selected on the spur of the moment, will advance the interests of the unit. By contrast, an experienced union representative who is familiar with the lore of the shop floor and who regularly deals with the employer in a variety of matters, including the processing of grievances, is likely to be of more assistance to both employer and employee at a *Weingarten* interview than is a coworker who may never have even attended such an interview or had any dealings with the employer beyond that of an employee. In fact, in the nonunionized setting, an employee is apparently free to choose any coworker as a representative, including someone who is personally involved in the matter under investigation, a result that certainly could lead to "representatives" who are not only hostile to the employer but extremely unlikely to be of any assistance to the employer in objectively getting to the bottom of the incident at issue.[98]

Another practical reason for refusing to extend the *Weingarten* right to the nonunionized setting relates to a separate point raised by the Supreme Court in *Weingarten*. As explained previously, the Court emphasized the fact that having a union representative present during an investigatory interview could help to safeguard the interests of the

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[97] 262 NLRB at 1021.

[98] It should be noted here that the present case is just such a situation. The person whom Borgs requested as his coworker-representative was Hasan, Borgs' partner in writing the January 17 memo about which Loehrke and Berger wished to meet with Borgs. Thus, Hasan would have been unlikely to be of assistance to the employer in any way at Borgs' interview as he had a direct interest in defending *himself* as well as Borgs.

bargaining unit generally. There is no similar guarantee in the nonunionized workplace. A coworker, chosen as a representative by an employee for his or her own personal reasons, may or may not have the interests of the rest of the workforce in mind. A coworker- representative certainly would not have the same kinds of incentives to look out for these wider interests that a union representative would. My colleagues in the majority again dismiss this concern as "wholly speculative." However, the fact that a given coworker-representative might act in the interests of the workforce as a whole does not overcome the very real concern that the likelihood of safeguarding the interests of an entire unit of employees is much more likely to occur in the unionized setting than the nonunionized setting.[99]

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[99] As explained, my colleagues assert that all of these concerns regarding a coworker-representative's inability to provide the same types of assistance as a union representative are mere speculation. They focus specifically on my concern that a coworker-representative will be of less assistance to the employer, but as I have explained, it is at least as likely that a coworker- representative will be less helpful to employees. One of the reasons that the *Weingarten* Court held that an employee's ability to have a union representative present at investigatory interviews was protected even though the employee at issue would be seeking aid or protection against *individual* discipline was that a *union* representative safeguards the interests of the entire bargaining unit. A union representative performs this function by making certain that the employer does not engage in a practice of imposing discipline unjustly and by his or her very presence at the interview, which assures other unit employees that he or she will provide the same aid or protection to them if it should become necessary. *Weingarten*, 420 U.S. at 260-261. There just is not the same type of assurance with a nonunion coworker-representative. To understand this fact, one must only consider the present case. Here, Hasan, the potential coworker-representative, took part with Borgs in the very activity under investigation. He thus had a vested interest and would have wanted to protect his own interests as well as Borgs'. It is unlikely that he would have been concerned with the possibility that the employer would apply similar discipline in some future situation, and it is even more

Because the factors that weighed in favor of *Weingarten* representation in the unionized setting are absent or at least drastically reduced in importance in the nonunionized setting, I would find that a proper balance of labor and management interests should not result in imposing the burden of *Weingarten* representation on employers in the nonunionized setting. Nonunionized employers should not be burdened with a duty either to accede to an employee's request for a coworker-representative or to forego an investigatory interview when neither the employee nor the employer is significantly assisted by the presence of such a representative. Moreover, as explained above, I would find that the NLRB itself forbids this result, a result that places a duty to recognize a representative in a specific, limited, and apparently arbitrary situation on an employer that is otherwise free to deal with employees individually. Because the result reached by the majority in this case runs counter to the Act and does not properly balance the interests of labor and management, I must dissent.

B. Hasan's Discharge

As explained above, the Respondent issued a written warning to Hasan for his part in the January 17 memo, which

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unlikely that his presence at the interview, as Borgs's friend and compatriot in the behavior under investigation, would have sent a message to other employees that he would be there for them if the need arose.

It is also important to point out here that my colleagues' discounting of these factors under the guise of speculation, relating to the benefits of union representatives at investigatory interviews, flies in the face of *Weingarten* itself. In that case, the Supreme Court emphasized the importance of these very benefits. They were an important part of the factors that went into balancing the conflicting interests of labor and management, a balancing that in *Weingarten* supported the finding that unionized employees are entitled to the presence of a union representative at investigatory interviews. Here, these same factors weigh against finding a similar right in nonunionized employees.

had stated that Berger's supervision of the project was no longer necessary. The warning explained that Hasan would be terminated if he engaged in any further misconduct or insubordination. Thereafter, the Respondent terminated Hasan and later provided him with a letter stating that he had been terminated because of his conduct over the previous nine months, specifically his refusal to accept supervision and his confrontations with staff members. The judge determined that the Respondent did not violate the Act when it warned and then discharged Hasan, because the January 17 memo was not protected activity. Nonetheless, my colleagues in the majority have decided that the Respondent did in fact violate Section 8(a)(1) based on their finding that the January 17 memo was in fact protected, concerted activity that was "inextricably intertwined" with the January 29 memo. According to my colleagues, the Respondent was motivated in its discharge of Hasan by its animus toward his protected activity relating to the memos and his earlier concerted conduct with Borgs. I, however, would adopt the judge's finding that the January 17 memo was not concerted, protected activity and that, therefore, the Respondent did not violate the Act when it discharged Hasan.

My colleagues in the majority find that, even if the sole purpose of the January 17 memo was to remove Berger as supervisor of the project, Hasan's conduct in preparing and submitting the memo was protected because Berger's conduct as a supervisor affected Hasan's working conditions. Additionally, they find that this January 17 memo was "inextricably intertwined" with the January 29 memo, which laid out Hasan's and Borgs's perceived problems with Berger's supervision. In this regard, my colleagues state that, because Loehrke and Berger had read both of the memos prior to their meeting with Hasan and their attempted meeting with Borgs on February 1, they "fully understood that the issues raised in the January 17 memo were not separate from the concerns about how they were being treated by their supervisor as set forth in

the subsequent memo." Based on this finding, which is in direct contrast to the judge's finding that the second memo was a mere "after-the-fact attempt at damage control," my colleagues determine that the January 17 memo was a clear attempt to raise issues related to Hasan's and Borgs's employment conditions and that therefore the reprimand that Hasan received for his part in writing and submitting the memo violated Section 8(a)(1). Additionally, according to my colleagues, Hasan's discharge was violative of Section 8(a)(1) because the Respondent put Hasan "on the verge of termination" for taking part in the memo-writing, activity that my colleagues find to be protected, and then cited his conduct over the last nine months, during which time Hasan did engage in some protected, concerted activity, in its termination letter. My colleagues assert that these two things demonstrate that the Respondent's animus toward Hasan's protected activity was the motivating factor behind his discharge.

Clearing away the smoke, the issues surrounding Hasan's discharge are determined by whether his conduct relating to the January 17 memo was protected.[100] The judge found that it was not, and my colleagues reject that determination. Under established law, employees are free to engage in concerted activities for mutual aid or protection in the absence of a union or collective-bargaining activity; however, concerted activity with the limited purpose of protesting the hiring, discharge, or continued employment of a supervisor [101] or of "affect[ing] the ultimate direction and managerial polices of the business" is not protected.[102] There is, of course, an exception to this rule,

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[100] Hasan's conduct in this regard was clearly "concerted" as he and Borgs wrote and submitted the January 17 memo together.

[101] *See, e.g., Atlantic-Pacific Construction Co. v. NLRB*, 52 F.3d 260, 262 (9th Cir. 1995); *NLRB v. Ford Radio & Mica Corp.*, 258 F.2d 457, 463 (2d Cir. 1958); *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749, 753 (4th Cir. 1949); *Hoytuck Corp.*, 285 NLRB 904 fn. 3 (1987).

[102] *Lutheran Social Service of Minnesota*, 250 NLRB 35, 41 (1980).

and it is that exception that my colleagues in the majority use to find that the January 17 memo was, in fact, protected activity. This exception applies to concerted activity that protests the selection or termination of a supervisor who directly impacts on the employees' working conditions.[103] My colleagues in the majority find that "Berger's supervisory duties had a significant impact on Hasan's terms [and] conditions of employment" and that, therefore, Hasan's part in the January 17 memo was protected activity.

I would find that Hasan's conduct with regard to the January 17 memo was not protected, because that memo explicitly called for Berger's removal as supervisor of the project and did not protest any actions that Berger had taken that affected Hasan's terms and conditions of employment. An examination of some of the cases that have found protected activity when employees have protested the employment of a supervisor demonstrate that the present case does not meet this exception.

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[103] *See, e.g.*, *Atlantic-Pacific Construction*, 52 F.3d at 262 ("[W]here the purpose of the concerted activity is not related to working conditions, as where personal animus motivates employee protest over the selection of a manager, the protest is not protected.") (citations omitted); *NLRB v. Oakes Machine Corp.*, 897 F.2d 84, 89 (2d Cir. 1990) ("In a narrow category of cases . . . concerted activity to protest the discharge of a supervisor or to effect the discharge or replacement of a supervisor may be 'protected,' provided the identity of the supervisor is directly related to terms and conditions of employment.") (citations omitted); *Caterpillar, Inc.*, 321 NLRB 1178, 1179-1180 (1996); *Hoytuck Corp.*, 285 NLRB at 904 n.3; *Fair Mercantile Co.*, 271 NLRB 1159, 1162 (1984), *enfd. mem.* 767 F.2d 930 (8th Cir. 1985), supplemented by 277 NLRB 1321 (1985); *Lutheran Social Service*, 250 NLRB at 41 ("[P]rotests against the appointment or termination of 'low-level' supervisors may be protected when directly related to the employees' conditions of employment.") (citations omitted).

In *Dreis & Krump Mfg. Co. v. NLRB*,[104] for example, the union brought a formal grievance on behalf of an employee, charging a supervisor with "negligence in overseeing safety and production."[105] During the grievance process, the employee distributed copies of the grievance and a statement about the matter to fellow employees.[106] He was thereafter discharged.[107] The Board found that the employer had violated the Act, and the Seventh Circuit upheld that determination. In so doing, the court distinguished the situation in which an employee protest of a supervisor is based on animus toward that supervisor and therefore is not protected.[108] As the court explained, the employee in *Dreis & Krump*, through circulation of the grievance and statement, was warning fellow employees about "supervisory deficiencies which potentially affect on-the-job safety and performance" and was therefore furthering a purpose of mutual aid or protection.[109] Thus, in *Dreis & Krump*, the employee activity focused on specific problems with the supervisor and articulated those problems within the protest materials themselves.

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[104] 544 F.2d 320 (7th Cir. 1976).

[105] *Id.* at 323.

[106] *Id.* at 324. The attached statement read, "ATTENTION ALL WORKERS This case of J. Mayer [employee] v. J. Mirabella [supervisor] concerns ALL workers. We must not think that Mirabella is just peculiar. The Company knows what Mirabella does and supports him and all other foremen who act like him. WE DON'T HAVE TO TAKE IT!!!" *Id.*

[107] *Id.*

[108] *Id.* at 327-328 (explicitly distinguishing the situation at issue in *Joanna Cotton Mills v. NLRB*, 176 F.2d 749 (4th Cir. 1949), in which an employee was discharged for circulating a petition calling for a supervisor's termination after "the supervisor had disciplined the employee for operating gambling devices and being overly attentive to female employees during working hours").

[109] *Id.* at 328.

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Similarly, in *NLRB v. Oakes Machine Corp.*,[110] the Second Circuit upheld the Board's determination that employee protests of a supervisor were protected and that the discharges that resulted violated the Act. In that case, an employee sent a letter to his employer's parent company, complaining about the conduct of the employer's president and was terminated as a result.[111] The court first noted that "[e]mployee action seeking to influence the identity of management hierarchy is normally unprotected activity,"[112] but then went on to determine that, in the circumstances of that case, the letter-writing was protected. The letter contained several paragraphs complaining of the company president's "diversion of company resources and personnel away from potentially profitable company projects, in order to advance [his] own personal projects."[113] The court found a direct relation to terms and conditions of employment in this protest because "although the letter did not specifically state[ ] that [the president's] diversion of personnel and resources to personal projects had reduced employees' salaries, that inference was permissible, if indeed, not compelled."[114] This was so because it was known that employee raises and bonuses were tied to company profitability, that employees had not received an annual raise because the company had not been profitable, and that employees had blamed the time they were required to spend on the president's personal projects for the unprofitable

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[110] 897 F.2d 84 (2d Cir. 1990).

[111] *Id.* at 86-87. Normally, employees "have no interest in the identity of high level management"; however, in this case, the company president could be considered much like a supervisor because he had "direct contact with employees, and his activities paralleled those of a low level supervisor at least to the extent that he made some job assignments." *Id.* at 90.

[112] *Id.* at 89.

[113] *Id.*

[114] *Id.*

year.[115] Thus, the letter to the parent company was clearly in protest of supervisor activities that affected employees' terms and conditions of employment.

Finally, *Caterpillar, Inc.*,[116] cited by my colleagues in the majority, provides yet another example of the required connection between the protest of a supervisor and the effect that that supervisor's activities have on employees' terms and conditions. There, the Board initially found that the employee protest was not actually an attempt to remove the chief executive officer,[117] but then went on to consider the effect that such a finding would have on its decision.[118] In *Caterpillar*, the employees had displayed the slogan "Permanently Replace Fites," Fites being the chief executive officer who had decided to replace permanently striking employees at other Caterpillar plants.[119] The Board found that the decision permanently to replace employees, conduct that was clearly referenced in the employees' chosen form of protest, "had an immediate and direct effect on the employees' 'lot as employees,'" thereby making their protest protected activity.[120] Again, however, *Caterpillar* involved activity on the part of employees that clearly referenced the actions by management that were under protest and that affected the employees' terms and conditions of employment.

In the instant case, the January 17 memo referenced no conduct by Berger. It merely stated that his supervision was no longer necessary.[121] There is absolutely nothing in the memo indicating that Hasan and Borgs were protesting any

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[115] *Id.*

[116] 321 NLRB 1178 (1996).

[117] *Id.* at 1178.

[118] *Id.* at 1179.

[119] *Id.*

[120] *Id.* at 1180.

[121] For the full text of the January 17 memo, *see supra* note 7.

conduct on the part of Berger that had any effect on their working conditions. Thus, I would find that the January 17 memo was merely an attempt to remove Berger as their supervisor and was therefore unprotected by the Act.

My colleagues in the majority assert that the January 29 memo establishes that the January 17 memo was actually directed at supervisor conduct with a direct impact on working conditions, even if the January 17 memo itself did not directly cite such conduct. In this regard, my colleagues are apparently at least impliedly rejecting the judge's finding that the January 29 memo was merely an attempt at after-the-fact damage control and not a sincere expression of concern about Berger's conduct as a supervisor. As I would accept the finding of the judge, who was able to observe the witnesses at the hearing and reach a conclusion based on all of the evidence and testimony, I disagree with my colleagues that the January 29 memo can somehow "save" the January 17 memo. As explained, the January 17 memo references absolutely no conduct on the part of Berger that would affect employee working conditions but rather merely calls for his removal as supervisor. The fact that Hasan and Borgs, after learning that Berger and Loehrke were angered by the January 17 memo, then drafted a second memo, in which they listed alleged problems with Berger's supervision, cannot mean that the initial memo is suddenly endowed with new meaning. Indeed, it is more a tacit recognition of the unprotected nature of the January 17 memo and an after-the-fact attempt to cover the clear omission from the January 17 memo.[122]

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[122] My colleagues assert that, in accepting the judge's finding that the January 29 memo was merely an after-the-fact attempt at damage control, I contend, "at least implicitly[,] that the January 17 memo must have related to something other than supervisory conduct affecting employees." As explained, my contention is that the January 17 memo did nothing more than call for Berger's removal as supervisor without protesting any specific actions on Berger's part. As the cases discussed supra demon-

It is true that, in assessing whether employee protests of supervisors are aimed at conduct affecting terms and condition, the Board should consider all of the surrounding circumstances.[123] Here, however, the judge made a clear finding that the January 29 memo was a mere after-the-fact attempt to justify Borgs's and Hasan's earlier behavior.There is no other evidence that Borgs and Hasan had raised these concerns about Berger *prior to* the January 17 memo. The January 29 memo, coming as it did after the initial employee conduct and apparently in response to employer reaction to that conduct, cannot alone bring the January 17 memo into the realm of protected activity. Because the January 17 memo references absolutely no supervisor conduct having a direct impact on employee terms and conditions of employment and because there is no evidence of conduct on the part of Borgs

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strate, absent some indication that the call for removal of a supervisor is in response to some specific activity on the part of that supervisor that affected employees' terms and conditions of employment, the Board should not find that such an unexplained call for a change in management is protected activity.

My colleagues also aver that the fact that the Respondent did not take action against Hasan until after it received the January 29 memo "reasonably suggests that the Respondent understood that both memos related to supervisory conduct affecting the employees." To the extent that this speculation is even relevant, it should also be noted that Hasan and Borgs wrote the January 29 memo *after* learning that Berger and Loehrke were displeased with the January 17 memo and that the Respondent's disciplinary memos to Hasan and Borgs referenced the January 17 memo. These additional facts can just as "reasonably suggest" that the Respondent viewed the two memos as separate: the January 17 memo calling for the removal of a supervisor with no supporting reason and the January 29 memo merely attempting to divert the negative attention engendered by the January 17 memo.

[123] *See, e.g., Oakes Machine*, 897 F.2d at 89 ("Whether employee activity aimed at replacing a supervisor is directly related to terms and conditions of employment is a factual inquiry, based on the totality of the circumstances.").

and Hasan contemporaneous with that memo that would suggest that the memo itself was aimed at specific supervisor conduct with an impact on terms and conditions, I would find that it is unprotected as a mere attempt to remove a supervisor. Therefore, I would find that Hasan's discharge was lawful.

III.

In summary, I would find that the Respondent employer has not violated the Act as a result of its discharge of Borgs or Hasan. Under current law, a nonunionized employee has no right to a *Weingarten*-type representative at an investigatory interview with his or her employer. I believe that this approach is correct. My colleagues' decision to return to the *Materials Research* approach and endow unrepresented employees with such a right is contrary to the NLRA, which does not required nonunionized employers to "deal with" unrecognized and uncertified employee representatives. Additionally, even if this approach were cognizable under the Act, it does not result in a reasonable balance of the competing interests of labor and management. Whereas a union representative in an investigatory interview can be of assistance to the individual employee, the employer, and the unit as a whole, a coworker-representative is unlikely to be of much assistance to anyone, and thus burdening nonunionized employers with a requirement to allow such representation or forego investigatory interviews does not strike a fair balance. I therefore dissent from my colleagues' finding that the Respondent's discharge of Borgs violated the Act.

Similarly, I would find that the Respondent's discharge of Hasan was not in violation of the Act. His part in the January 17 memo was not protected activity because that memo did nothing more than call for the removal of a supervisor without citing a single incident of supervisory conduct that affected his terms or conditions of employment. Such activity is unprotected. The January 29 memo should not alter this

finding as the judge specifically found that it was nothing more than an after-the-fact attempt at damage control. I therefore dissent from my colleagues' finding of a violation with regard to Hasan's discharge as well.

Dated, Washington, D.C. July 10, 2000

J. Robert Brame III Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate employees concerning their concerted protected activities.

WE WILL NOT issue disciplinary warnings to employees for disclosing or discussing their wages with other employees.

WE WILL NOT threaten employees with reprisals for disclosing or discussing their wages with other employees.

WE WILL NOT maintain a rule prohibiting employees from disclosing or discussing their wages with other employees.

WE WILL NOT issue disciplinary warnings to employees for engaging in protected concerted activities.

WE WILL NOT discharge employees for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind our policy prohibiting employees from discussing their wages with other employees.

WE WILL, within 14 days from the date of the Board's Order, offer Arnis Borgs and Ashraful Hasan full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Arnis Borgs and Ashraful Hasan whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings and discharges of Arnis Borgs and Ashraful Hasan, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the warnings and discharges will not be used against them in any way.

EPILEPSY FOUNDATION OF NORTHEAST OHIO

Paul C. Lund, Esq., for the General Counsel.
Cynthia Lowencamp, Esq., of Cleveland, Ohio, and *Neil Myers, Esq.*, of Euclid, Ohio, for the Charging *Parties.*
Steven Moss, Esq., and Morlee A. Rothchild, Esq., for the Respondent.

APPENDIX C

DECISION

Statement of the Case

RICHARD A. SCULLY, Administrative Law Judge. Upon charges filed on April 10, 1996,[1] by Arnis Borgs and on May 13, 1996, by Ashraful Hasan, the Regional Director, Region 8, National Labor Relations Board (the Board), issued a consolidated complaint on November 14, 1996, alleging that Epilepsy Foundation of Northeast Ohio (the Respondent), had committed certain violations of Section 8(a)(1) of the National Labor Relations Act, as amended (the Act). The Respondent filed a timely answer denying that it had committed any violation of the Act.

A hearing was held in Cleveland, Ohio, on April 15 through 17, 1997, at which all parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration. Upon the entire record, and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Respondent was a not-for-profit corporation engaged in the prevention and control of epilepsy at its facility located in Cleveland, Ohio. Annually, in the course and conduct of its business operations, the Respondent receives funds and contributions in excess of $500,000 of which over $50,000 is received directly from points located outside the State of Ohio. The Respondent has admitted the foregoing facts but in its answer and at the hearing denied

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[1] Amended charges were filed by Borgs on June 21 and 27, 1996.

that it is subject to the Board's jurisdiction because it is a nonprofit charitable social service organization. It did not discuss this issue in its brief and has offered no other reasons why it would not be subject to the Board's jurisdiction. The Board has long held that the only basis for declining jurisdiction over a charitable organization is a finding that its activities do not have a sufficient impact on interstate commerce to warrant the exercise of its jurisdiction. *St. Aloysius Home*, 224 NLRB 1344, 1345 (1976). Here, the Respondent's annual revenues far exceed the discretionary jurisdictional standards applicable to health care institutions and social service organizations. *See Hispanic Federation for Social Development*, 284 NLRB 500 (1987). Moreover, as the Board has pointed out, employees of a nonprofit charitable organization have the same Section 7 rights to engage in protected concerted activities as do employees of commercial enterprises and are entitled to the remedial measures which may be required to remedy unlawful interference with such rights. *United Services for the Handicapped*, 251 NLRB 823, 825 (1980). Accordingly, I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and is subject to the jurisdiction of the Board.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent provides services to persons affected by epilepsy throughout Northeast Ohio. It is an affiliate of the Epilepsy Foundation of America (EFA) and participates in EFA sponsored programs. In 1993, the National Institute of Disability and Rehabilitation Research (NIDRR) awarded EFA a grant to conduct a research project involving school-to-work transition for teenagers with epilepsy. The Respondent submitted a proposal and was selected by EFA to conduct a three-year demonstration project in which teenagers with

epilepsy were recruited to participate in a vocational program, involving classroom and work experience with employers in the community, to prepare them for the transition from school to work. The Respondent was responsible for hiring, supervising and evaluating the staff needed to conduct the NIDRR project. The on-site immediate supervisor of the project, which commenced in October 1993, was Julie Johnson until she left in March 1994 and was replaced by the Respondent's Director of Vocational Services Rick Berger. Christine Loehrke, the Respondent's current Executive Director has had responsibility for overseeing the project from the outset. The project was also to be monitored by Jim Troxell, an EFA representative, and was to receive data processing and analytical services from Dr. Bob Fraser, a representative of the University of Washington. The project included a full-time position for a Transition Specialist and Dr. Ashraful Hasan was hired by the Respondent to fill that position. Arnis Borgs was hired by the Respondent in June 1994 as a part time job coach and later became a full time Employment Specialist, a position that involved placing clients with epilepsy in jobs and assisting them in performing the jobs. In early 1995, he began working on the NIDRR project and his time was divided equally between his regular placement activities and duties related to the project.

B. Allegations Concerning Wage Information

The complaint alleges that on or about December 28, 1995, Arnis Borgs was unlawfully interrogated and threatened with unspecified reprisals for discussing employees' wages; that on that date the Respondent promulgated a rule unlawfully prohibiting employees from discussing wages; that, on January 3, 1996, he was given a written reprimand for obtaining and disclosing salary information; and that, on or about January 9, he was given another reprimand for insubordination because he had failed to return the warning notice he was previously given.

Borgs testified that in the late fall of 1995 he had discussions with other employees, including Tom Harkness and John Novak, concerning their wages. His annual evaluation was approaching and he asked other employees how much they were making and how raises were calculated. Some employees shared wage information with him and some did not. On December 28, he was called to a meeting with Berger and Loehrke. Just prior to that meeting, Berger told Borgs that Loehrke was "really angry" at Borgs because of his involvement in getting the employees' mileage reimbursement increased, discussed below, but also said that if Borgs repeated it to anyone he would deny having said so. At the meeting, Loehrke asked if Borgs had been discussing salaries with other employees, why he did so, and where he had gotten such information. Borgs responded that he was curious as to what other employees were making and that he had gotten the information directly from the employees. Loehrke told him that it was against the Respondent's policy to disclose salary information and Borgs said that he had not disclosed it but merely discussed it in casual conversations. Berger accused him of having a list of salaries that he was showing around, which Borgs denied. They continued to ask him why he wanted such information and where he had gotten it. Near the end of the meeting, Berger told him that he was being given "a warning" not to discuss salaries again. Loehrke said there was a policy against salary disclosure, that he should not be getting or disclosingsuch information, and that if he did it again he would be reprimanded. On January 3, 1996, Berger gave him a written warning notice for unauthorized access to and dissemination of confidential salary information. Berger told him he could sign or not sign the notice as he chose, but that it had to be returned. Borgs took the notice and, when Berger asked about it, he said he wanted to discuss it with someone outside the agency and would return it on January 10. On that date, when Borgs returned the first warning notice to Berger with his comments on it, he

was given another warning notice. That notice reiterated that he was being warned for acquiring and sharing confidential salary information as well as for being "insubordinate" and having "confiscated" agency property by reason of his failure to return the first warning notice.

Christine Loehrke testified that salaries of the Respondent's staff are confidential and that only only she, the Director of Administration Jim Wilson, and the bookkeeper have access to them. Payroll information is kept in a locked file cabinet to which only the same three people have access. She testified that the Respondent has an unwritten policy that unauthorized access to or dissemination of confidential information is unacceptable. In late November 1995, she was informed by Berger that Borgs had shared with employee Jeff Schoenberger a list of employee salaries and was provided with a memo, dated November 28, 1995, from Schoenberger about the incident. Berger also told her about a conversation he allegedly had with Borgs and Hasan in which they indicated they had information concerning the salaries of several staff members, including Berger, Wilson and Carol Doubler, a supervisor in the employment department. Berger asked how they acquired the information and they said that "they had their ways." After receiving this information from Berger, she asked the people he had mentioned if they had voluntarily disclosed salary information to Borgs and was told that they had not. On December 28, 1995, she and Berger met with Borgs. She told Borgs that she had learned that he had a list of salaries. Borgs denied having a list and said that what salary information he had was given to him voluntarily. She informed him of the Respondent's policy concerning confidential information, that he was being given a verbal warning and that any similar acts would be dealt with "in a harsher way." On the following day she prepared a warning notice and gave it to Berger to give to Borgs. After Berger told her that Borgs had taken the warning notice to show it to

someone and had not returned it, he was given a written notice that it had to be returned by January 9, 1996. When Borgs did not return the warning notice on January 9, after being told to do so several times, she prepared another warning for insubordination.

Analysis and Conclusions

The Board has held that, in the absence of a business justification for it, a rule requiring that employee salaries be kept confidential and not be disclosed to other employees constitutes a clear restraint on the employees' Section 7 right to engage in concerted activities for mutual aid and protection concerning an undeniably significant term of employment. *E.g., Leather Center, Inc.*, 312 NLRB 521, 527 (1992); *Heck's, Inc.*, 293 NLRB 1111, 1119 (1989). The Respondent contends that Borgs was not interrogated about or disciplined for discussing salary information with other employees who voluntarily disclosed such information, but for the unauthorized acquisition and disclosure of salary information concerning supervisory employees who had not disclosed it to him.

The warning notice, dated December 28, 1995, prepared by Loehrke, states: "He [[Borgs] was told that agency policy holds salary info. confidential and that unauthorized access to this info., and/or unauthorized release of this info., is unacceptable." A similar statement appears in the warning notice, dated January 9, 1996.[2] There is no evidence that this "unwritten policy" had actually been promulgated previously or that the Respondent had any business justification for such a policy. The finding of a violation for prohibiting disclosure of salary information "is not premised on mandatory phrasing, subjective impact, or even evidence of enforcement, but

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[2] These statements are consistent with Borgs' credible testimony as to what he was told by Loehrke about the confidentiality of salary information on December 28, 1995.

rather on the reasonable tendency of such a prohibition to coerce employees in the exercise of fundamental rights protected by the Act." *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992). The clear import of the Respondent's policy is that obtaining or disclosing any salary information is prohibited, not just that which concerns supervisory personnel or is contained in confidential files, and that even voluntary disclosure of an employee's own salary would violate the policy. If the Respondent intended the prohibition to apply only to accessing salary information concerning supervisors or that which is physically contained in confidential files, it could have said so. Its blanket prohibition against obtaining or disclosing any salary information, in the absence of any business justification for such a rule, was overly broad and could reasonably be expected to stifle any discussion of salary information. *See Service Merchandise Co.*, 299 NLRB 1125, 1126 (1990). I find that the Respondent's promulgation of this rule on December 28, 1995 violated Section 8(a)(1).

I also find that the interrogation of Borgs and the warnings issued to him for discussing salary information were unlawful. As noted, Section 7 protects employees' rights to discuss salary information. On December 28, 1995, Borgs was called in to a meeting with Berger, one of his supervisors, and Loehrke, the Respondent's highest ranking official, and quizzed about protected activity, viz., discussing salary information. Immediately prior to the meeting, Berger informed him that Loehrke was "really angry" over Borgs' having engaged in other, unrelated protected activity, his campaign to get the mileage reimbursement increased. At the meeting, he was questioned about whether he had discussed salary information with other employees, why he did so, and where he had gotten such information. Borgs admitted discussing salary information with other employees who had disclosed such information to him, but denied the accusation that he had a list of salaries. He was told that he had violated a policy

against obtaining and disclosing salary information, that he was being given a warning for the violation, and that any similar activity would would be dealt with in a harsher manner. In evaluating whether an interrogation concerning an employee's protected activity was coercive, all of the surrounding circumstances must be considered. *Rossmore House*, 269 NLRB 1176, 1177 (1985). I find that this interrogation of Borgs, which concerned an accusation that he had violated an unlawful policy against discussing salary information and was accompanied by a warning and threat of additional, harsher disciplinary action, had a reasonable tendency to restrain, coerce and interfere with protected rights and violated Section 8(a)(1). *Super One Foods*, 294 NLRB 462, 464 (1989).

The clear language in the disciplinary warning notices issued to Borgs establishes that he was being disciplined for violating the Respondent's overly broad policy prohibiting obtaining and disclosing salary information. Since the policy was unlawful, disciplinary action based on a violation of that policy would, likewise, violate the Act. *Elston Electronics Corp.*, 292 NLRB 510, 511 (1989). However, the Respondent contends that the real reason for the warnings to Borgs was that it had a reasonablebelief that he had improperly obtained confidential salary information concerning supervisory employees who had not voluntarily shared such information with him. There no credible evidence to establish this. There is substantial evidence to the contrary, not the least of which is the failure to mention such a reason in either of the warning notices. Moreover, the evidence shows that, while Loehrke made the decision to take disciplinary action against Borgs, she had little, if any, personal knowledge concerning the alleged salary disclosures by Borgs and her actions were based entirely on information purportedly provided by Berger. Berger was not called as a witness by the Respondent and its failure to do so has not been explained.

There is no evidence that Berger was unavailable at the time of the hearing or that he was not favorably disposed toward the Respondent. This creates the inference, which I draw, that Berger's testimony would not have supported the Respondent's position. *See International Business Machines*, 285 NLRB 1122, 1123 (1987). I also find that Loehrke's testimony about this matter cannot be credited. She stated that she first learned about about the matter in November 1995 from Berger, who told her that Borgs had shown a list of salaries to Schoenberger and that in another incident Borgs and Hasan had told Berger that they had information about the salaries of supervisors. However, a memo, dated November 28, 1995, written by Berger, refers only to Schoenberger's report about Borgs' showing him a list of salaries and makes no mention of the alleged incident involving Borgs and Hasan. I find the fact that there is no mention of that incident in the memo, that no action was taken against Hasan (who credibly denied the incident ever happened) with respect to having obtained salary information, and that Berger did not testify establishes that the incident never happened. The record also contains a memo from Schoenberger to Berger in which he reported that Borgs showed him a list of salaries, complained about an unfair agency pay scale, and said that raises were not given to employees who deserved them but just to friends of Loehrke. The memo indicates that this had occurred on March 31, 1995, nearly eight month before. That memo also contains a handwritten note by Loehrke, dated January 29, 1996, in which she states that, in talking with Schoenberger, she had "discovered" that the list was "verbal" and there was no written document. This suggests that she had not talked to Schoenberger about the matter before disciplining Borgs as she had implied during her testimony.

Finally, there is no credible evidence to support Loehrke's alleged belief that Borgs had improperly obtained confidential information concerning any supervisor's salary. Borgs has consistently maintained, when questioned by Loehrke and

in credible testimony at the hearing, that whatever salary information he had was voluntarily disclosed to him by other employees. As discussed above, I do not credit Loehrke's testimony that Berger told her about Borgs and Hasan having information concerning the salaries of Berger, Wilson and Doubler. The only other evidence is Berger's memo to Loehrke about what Schoenberger had allegedly told him. That memo,states: "I asked Jeff [Schoenberger] if I was on the list. I was, and the amount was not close." It follows that even if what Schoenberger said was true, since the amount was "not close" to being correct, there was no basis to conclude that Borgs had obtained such information from the Respondent's confidential files. I find that the Respondent issued the warnings to Borgs because he had violated its unlawful policy prohibiting the discussion of wages by employees and not because he had improperly obtained or disclosed confidential information concerning the salaries of supervisors. Since these warnings violated Section 8(a)(1), the additional basis for the second warning, Borgs' alleged insubordination and confiscation of agency property by not promptly returning the first warning notice, was also unlawful.

C. Discharges of Borgs and Hasan

The complaint alleges that the Respondent unlawfully discharged Arnis Borgs and that it unlawfully reprimanded and discharged Ashrafal Hasan because they had engaged in concerted activities protected by the Act.

1. Alleged Concerted Activity

The evidence shows that during 1995, Borgs had been engaged in trying to get the Respondent to increase the amount it reimbursed employees for mileage when they used their personal vehicles for work. The Respondent's employee handbook provides that employees who are required to use their personal automobiles for business will be reimbursed at "the IRS approved rate for mileage." The IRS approved rate

was 29 cents and employees were only receiving 25 cents per mile. He credibly testified without contradiction that, beginning in January and February, he had discussed the reimbursement issue with other employees in the employment department where he worked and later with employees in the social services department. Several indicated they approved of his raising the issue with the Employer. He described one such conversation, in which employee John Novak said that it would be great if Borgs got an increase for everyone, but that he did not want to be involved because he feared repercussions. In one of his communications to Loehrke about the issue, Borgs stated that at least five other employees had expressed their concern about it.

Borgs testified that he raised the reimbursement issue with the Respondent's bookkeeper and that on June 12, 1995, the bookkeeper issued a memorandum stating that from then on mileage would be reimbursed at the rate of 29 cents per mile. A short time later that same day, Berger read the memo and went around and told all employees that the memo had been rescinded. In July, Borgs went to Loehrke to ask about increasing the mileage reimbursement and followed up with a memo, dated September 30. He subsequently prepared and submitted a bill, dated November 15, 1995, for $135.60, representing the difference between the amount he was paid for mileage during 1995 and what he claimed was due him under the 29 cent per mile rate. Loehrke responded with a note, dated November 20, stating that the 25 cent per mile rate would be in effect until further notice. Borgs sent her another memo, dated November 22, pointing out that the handbook called for reimbursement at the IRS approved rate and asking for an explanation as to why the policy in the handbook was not being followed. He sent another memo, dated December 11, 1995, to Loehrke asking for clarification of the reimbursement policy. Loehrke returned the memo with a handwritten note on it. saying that she had already

discussed the matter with him "2 times." On December 19, 1995, Loehrke issued a memo stating that mileage reimbursement would be made at 29 cents per mile, retroactive to January 1, 1995.

Between August and December 1995, Borgs and Hasan engaged in a "Brown Bag Lunch" program in which employees got together about a half dozen times during their lunch hours to discuss matters of mutual concern. Borgs testified that around the time the program began both Loehrke and Berger indicated that they disapproved of the meetings and that Berger told one of the secretaries that she could not attend. Hasan testified that Berger was critical of the program and questioned why the meetings were being held which prompted him to invite Berger to attend. In November 1995, Borgs and Hasan started an "Ethics Committee" which held two meetings in which employees were given the opportunity to address problems concerning employee relations and delivery of sevices to clients. Hasan testified that Berger told him that Loehrke questioned the purpose of the committee and felt that its title implied that "there is something unethical going on." Minutes of the meetings were posted in the office. They also distributed a questionnaire to the employees asking for their opinions about work-related matters, including, "leadership vision" and "supervisory integrity."

There is evidence that one of the clients involved in the NIDRR project had multiple disabilities requiring the use of an interpreter and that Hasan and Borgs had hired an interpreter without following the agency's subcontracting procedure. Hasan testified that Berger refused to pay the invoices he submitted for the the interpreter's services and he had to pay her himself to prevent the disruption of services to the client. Carol Doubler testified that, at the direction of Berger, she contacted the interpreter and requested that she appear for an interview and to complete the required paperwork. The interpreter told her that she was upset about

statements that Hasan and Borgs had made that indicated she was being used in a "political battle" they were fighting at the agency and that she did not wish to have any further contact with either of them. Doubler told Hasan what the interpreter had said, but a week later the interpreter called to say that Hasan had contacted her again and that she was extremely upset over it. The record contains a memo Berger wrote, dated June 7, 1995, about the incident which states that Hasan and Borgs were given verbal warnings for their actions. The memo was apparently placed in their personnel files. Hasan and Borgs both testified that they had discussed the interpreter incident with Berger and that after they clarified what had happened, Berger told them that he had misunderstood the facts concerning the incident and that nothing derogatory or negative would be put in their personnel files. Hasan subsequently reviewed his personnel file and discovered the warning memo Berger had placed there. Thereafter, he wrote a memo to Berger, dated, October 5, 1995, in which he referred to their previous conversation, complained about Berger's placing the warnings in their files and demanded an explanation. Hasan sent copies of this memo to both Loehrke and Borgs. Berger responded with a memo, dated October 13, 1995, which criticized the "insubordinate tone" of Hasan's memo and accused him of undermining Berger's supervision of Borgs by sending a copy of it to him. Loehrke testified that she considered Hasan's memo threatening, hostile and disrespectful, that she felt Hasan "had crossed the line," that "strong action had to be taken," and that she assisted Berger in preparing his response. She said that she considered Hasan's memo insubordinate and that by sending a copy to Borgs, who had no need to be involved, it might also encourage him to be insubordinate. Loehrke had no personal knowledge of the interpreter incident and did not talk to Hasan about his memo. Berger did not testify.

Consequently, I find no reason to doubt the uncontradicted testimony of Hasan and Borgs that Berger told them there would be nothing adverse placed in their files as a result of the incident. When Hasan discovered that Berger had, in fact, issued warnings to both him and Borgs, based on that incident, his efforts to question and dispute the warnings constituted concerted activity on his part. There is nothing in the memo that is so outrageous, egregious or disrutive as to lose the protection of the Act. E.g., *Martin Marietta* Corp., 293 NLRB 719, 725 (1989); *YMCA of Pikes Peak Region*, 291 NLRB 998 (1988).

2. Events Leading to the Discharges

On January 17, 1996,[3] Hasan and Borgs prepared and submitted a memo to Berger concerning the NIDRR project which stated:

> Mr. Jim Troxell and Dr. Bob Fraser have continued to provide supervisory input pertaining to service delivery and the research component of the study. During the past several months, Ms. Christine Loehrke has also provided input and assistance to the NIDRR School-to Work Project.
>
> As mentioned during earlier discussions (albeit brief) with you, both Dr. Ashraful Hasan and Mr. Arnis Borgs reiterate that your supervision of the program operations performed by them is not required.
>
> Your input to the NIDRR project in the past is appreciated. At this stage, the major area which has to be addressed—deals with outreach. *Only* support staff assistance is needed in this regard.

A copy of the memo was sent to Loehrke who was away from the office at the time.

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[3] Hereinafter, all dates are in 1996.

Hasan and Borgs testified that they had encountered problems with Berger failing to carry out tasks relating to out reach for the project. The memo was intended as a needs assessment for the project, which Hasan described as "top heavy" with supervision while what was really needed was more secretarial help. When they learned that both Berger and Loehrke were very unhappy about the memo, they submitted another eight-page memo, dated January 29, with the stated intention of elaborating upon the reasons underlying the previous memo, detailing the problems they felt were undermining and endangering the project, and suggesting solutions.

On February 1, Berger came to Hasan and Borgs and told them that Loehrke wanted each of them to meet, individually, with her and Berger. Hasan informed Berger that they were involved in a meeting and could not meet with them at that moment. A short time later, Loehrke came in and informed them that they had to meet. Loehrke told Borgs that she needed him to meet with her and Berger. Borgs testified that he declined because he felt intimidated after the meeting he had alone with the two of them about salary information. Borgs said that he would meet with Loehrke alone, but she said that was not an option and that Berger had to be present. Borgs asked if Hasan could also be present and Loehrke said that also was not an option. When Borgs reiterated his refusal to meet with the two of them by himself, Loehrke told him to go home for the rest of the day and report back at 9:00 a.m. on the following morning. Borgs was told to surrender his key to the office and was escorted out of the building. When he returned the next day, he met with Loehrke and Wilson in a conference room. Loehrke told him that his refusal to meet the previous day constituted gross insubordination and that he was terminated. He was given a termination letter, signed by Loehrke, stating that over the last several weeks the agency had brought to his attention, "several concerns about [his] conduct and performance." This included failing to build

constructive work relationships with management personnel and resistance to accepting performance goals. The letter also refers to his involvement in the January 17 memo, which is said to indicate his unwillingness to accept supervision of his work, and his refusal to meet with Loehrke and Berger on February 1, to discuss these issues, which is said to be an unacceptable challenge to her authority and to constitute gross insubordination.

Hasan eventually agreed to meet with Loehrke and Berger on February 1. Hasan testified that during the meeting, which lasted about 20 minutes, Loehrke expressed her annoyance with the January 29 memo and said she would not tolerate such memos. Hasan told them that both memos were needs assessments meant to identify difficulties in the project and how to implement ways to revitalize it. After the meeting ended, Hasan received a warning notice in his mailbox, stating that the memo of January 17, he had co-signed, constituted gross insubordination and any further acts of misconduct or insubordination would result in immediate discharge.

Loehrke testified that Hasan also initially refused to meet with her and Berger and that he agreed only after he refused her order to leave the building and she had threatened to have him removed by the police. She said that the memo of January 17 indicated that Hasan and Borgs felt they did not need supervision by Berger and that the purpose of the meeting was to tell Hasan that she considered the content of the memo "inappropriate," as was the method in which it was delivered to Berger, while she was away from the office. At the meeting, Hasan told her that the memo was a needs assessment. She told him that needs assessments were neccessary but that she had never seen a needs assessment done in such a manner, that she did not see the memo as a needs assessment but as a dismissal of Berger from his supervisory duties over the project which constituted insubordination, and that she expected him to work with Berger as his supervisor

to complete the project. She attempted to give him a written warning notice for insubordination, but he refused to take it or to sign it. She read the notice to him and put a copy in his mailbox. Loehrke testified that she did not discuss the January 29 memo with Hasan at the February 1 meeting because she considered it a separate issue from the January 19 memo, which she felt warranted strong disciplinary action. However, she and the director of administration met with Hasan on February 2 for about two hours in order to go over each of the concerns and accusations expressed in the January 29 memo.

On March 25, Hasan was called to Loehrke's office where he was told that he was being terminated. Hasan testified that he was given no reason for his termination at that time. On March 29, when he returned to pick up his belongings, he was given a letter signed by Loehrke stating that he was terminated for his conduct over the previous nine months, including, refusal to accept supervision on the NIDRR project and various confrontations with staff members. Loehrke testified that Hasan was terminated because he refused to sign a statement of personal project objectives given him by Berger, that his refusal was done "willingly" and "defiantly," that it constituted gross insubordination and subjected him to discharge. The Respondent's brief confirms that the reason Hasan was terminated was his refusal to sign the performance objectives.

Analysis and Conclusions

The General Counsel contends that Hasan and Borgs were discharged in retaliation for their having engaged in concerted activity protected by the Act. The Respondent contends that their actions in connection with the January 17 memo to Berger did not constitute protected activity and the other instances of concerted activity on their part had nothing to do with their terminations.

In cases where an employer's motivation for a personnel action is in issue, it must be analyzed in accordance with the test outlined by the Board in *Wright Line*, 251 NLRB 1083 (1980) *enf'd* 662 F. 2d 800 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must persuade the Board that animus toward protected activity on the part of the employee was a substantial or motivating factor in the employer's decision. Once that has been done, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected activity on the employee's part. *Manno Electric*, 321 NLRB 278, 280 at fn. 12 (1996). The General Counsel's initial burden is met by proof of protected activity on the part of the employee, employer knowledge of that activity and employer animus toward it. *W.R. Case & Sons Cutlery Co.*, 307 NLRB 1457, 1463 (1992).

a. Arnis Borgs

In the case of Borgs, I find that his efforts throughout 1995 to obtain increased mileage reimbursement for agency employees constituted protected concerted activity in that they were "engaged in with or on the authority of other employees, and not solely by or on behalf of the employee himself." *See Meyers Industries*, 882, 885 (1986). His uncontradicted testimony that he told Loehrke that he had discussed the matter with at least five other employees establishes that the Respondent had at least constructive knowledge of the concerted nature of those activities. *See Nicola's*, 299 NLRB 860, 863 (1990). Borgs' uncontradicted testimony that Berger told him that Loehrke was "really angry" about his raising the reimbursement question establishes the Respondent's animus toward his activity. I have also found that Borgs was unlawfully disciplined for engaging in the protected activity of discussing employee salaries with another employee. Neither of these matters was so remote in time from his discharge as to

preclude inferring a causal connection between those activities and the discharge. Consequently, I find that there is evidence sufficient to support the inference that Borgs was discharged in retaliation for his having engaged in those activities. I also find that the Respondent has established that it would have discharged Borgs even in the absence of those protected activities on his part.

As is discussed below, I find that the memo that Borgs and Hasan sent to Berger on January 17 did not constitute activity protected by the Act; therefore, disciplinary action arising as a direct or indirect result thereof did not violate the Act. An employer has the right to maintain order and to control its workplace and to discipline its employees for misconduct. *Postal Service*, 268 NLRB 274, 275 (1983). Loehrke credibly testified that she wanted Borgs to meet with her in Berger's presence in order to make it clear to him that he had to work under Berger's supervision on the NIDRR project and to give him a written warning for his involvement in the January 17 memo. When Borgs refused to meet with her, she considered his action to be gross insubordination which threatened to undermine her authority as executive director of the agency. I find that Borgs' persistent refusal to comply with Loehrke's direct order to meet constituted insubordination and that the Respondent did not violate the Act by discharging him for this misconduct. *Cf. Carolina Freight Carriers Corp.*, 295 NLRB 1080 at fn. 1 (1989).

The General Counsel also contends that Borgs' discharge was unlawful because he was denied the right to be represented by a fellow employee, Hasan, at an investigatory interview he had reason to believe could result in disciplinary action against him. *See NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975). I find the evidence establishes that the meeting that Borgs refused to attend with Loehrke and Berger was intended to be an investigatory interview; that he had reason to believe the interview could result in disciplinary action;

that he made a timely request that Hasan be allowed to accompany him to the interview, which was denied; and that he was discharged because of his refusal to attend the interview. However, current Board law is clear that *Weingarten* rights to representation in investigatory interviews are limited to "employees in unionized workplaces who request the presence of a union representative." *E.I. DuPont & Co.*, 289 NLRB 627, 631 (1988). The General Counsel recognizes this but seeks to have the Board reconsider the matter. That request must be taken up with the Board. It is the duty of an administrative law judge to apply established Board precedent which the Board or the Supreme Court has not reversed. E.g., *Herbert Insulation Corp.*, 312 NLRB 602, 608 (1993); *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1965). I find that the Respondent did not violate Section 8(a)(1) by discharging Borgs for refusing to attend an investigatory interview on February 1, after his request that Hasan be allowed to accompany him at that interview was denied.

b. Ashraful Hasan

In the case of Hasan, I find the evidence fails to support an inference that the Respondent harbored animus toward Hasan based on protected activity on his part to the extent that it would violate the law in order to put a stop to such activity. *See Raysel-IDE, Inc.*, 284 NLRB 879, 880 (1987). I find no evidence to support the General Counsel's contention that Loehrke had "a hostile, almost paranoid attitude, toward employees who engage in concerted activities, or which she perceives as concerted." Although there was uncontradicted testimony that Berger was critical, at least initially, of the "Brown Bag Lunch" program Hasan and Borgs started, Loehrke credibly testified that she supported the idea of holding the lunches and there is no evidence that she interfered with the program or took any adverse action against any participant. Her testimony that she was a little concerned about the title of the "Ethics Committee" they

proposed because it implied there was something unethical going on, without more, does not establish animus, particularly, where there is no evidence that she did anything to discourage or prevent the formation of such a committee or took any adverse action against the participants. Moreover, Hasan's involvement in these activities and the flap over the comments placed in his personnel file in connection with the interpreter matter were remote in time and unrelated to the events that led to his discharge. *See D & W Food Centers*, 305 NLRB 553 (1991).

The main thrust of the General Counsel's case with respect to Hasan is that the Respondent retaliated against him because of his involvement in the January 17 memo to Berger, which is asserted to have constituted protected activity on his and Borgs' parts. Although both Hasan and Borgs have attempted to portray their January 17 memo to Berger as a "needs assessment," this characterization and their memo of January 29 appear to be after-the-fact attempts at damage control. There is nothing in the January 17 memo which details any problems with the NIDRR project or attributes them to supervisory shortcomings on the part of Berger. It does not propose any solutions or request that Loehrke or the Respondent take appropriate remedial action and it does not seek to enlist the support of other employees for their mutual aid or protection. Unlike the leaflets distributed to fellow employees in *Dreis & Krump Manufacturing, Inc.*,[4] this memo does not purport to protest the quality of Berger's supervision as it relates their or other employees' working conditions and unlike the complaints by employees in *Fair Mercantile Co.*,[5] the memo is not an attempt to discuss problems related to Berger's supervision of them with higher management. It simply informs Berger that his supervision of

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[4] 221 NLRB 309 (1975).

[5] 271 NLRB 1159 (1984)

Hasan and Borgs "is not required." The clear import of the memo is that they were dismissing him as their supervisor and from involvement in the NIDRR project. If what they wanted to do was to raise concerns about the project or the quality of Berger's supervision, they could have said so. This was not a situation like that in *NLRB v. Washington Aluminum Co.*,[6] in which employees who were not particularly sophisticated or articulate "had to speak for themselves as best they could." 370 U.S. at 14. Borgs was a college graduate and Hasan has a doctorate. It must be assumed that they knew what they were doing and crafted the memo to accomplish their goal. It must also be assumed that, once the memo was issued, neither Hasan nor Borgs considered himself subject to Berger's supervision. Since Loehrke was not directly involved in the project after September 1994, and in any event was out of town when the memo was issued, it in effect purported to remove the Respondent from any supervisory role over the NIDRR project. Not surprisingly, Loehrke interpreted the memo as a dismissal of Berger from the project and she considered it grossly insubordinate. The evidencealso shows that when Loehrke received the memo of January 29, in which Borgs and Hasan actually detailed what they considered to be problems with the project and proposed some solutions, she promptly met with Hasan to discuss those matters and took no adverse action against him. I find that the actions of Borgs and Hasan in writing and issuing the January 17 memo were concerted but were not protected under the Act. Accordingly, the Respondent did not violate the Act by issuing a disciplinary warning to Hasan for insubordination for his part in the purported dismissal of Berger from the NIDRR project. I also find that the Respondent's actions in

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[6] 370 U.S. 9 (1962).

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response to the memo were not motivated by animus toward Hasan for engaging in protected activity, but were prompted by his insubordinate conduct.

There is evidence that Hasan had been involved in a number of incidents having nothing to do with protected activity, which Loehrke considered insubordinate and/or disruptive; including, the substance of the matter involving the interpreter (as opposed to Hasan's complaint over the memo placed in his personnel file), confrontations over his demands for preferential treatment in obtaining clerical assistance and an incident in which his insensitive behavior adversely impacted the parents of an agency client. It may well be that she was looking for a reason to terminate him and that she seized on his refusal to sign the statement of project objectives to do so. In the absence of evidence sufficient to support an inference that animus toward protected activity on his part was a motivating factor in his discharge, her reason is irrelevant. It is well recognized that an employer is free to run its business as it pleases and can discharge an employee for a good reason, a bad reason, or no reason, so long as it is not for an unlawful reason. *See Wright Line, supra*, at 1084. Having found there was no nexus between Hasan's discharge and protected activity on his part, I shall recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Epilepsy Foundation of Northeast Ohio, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by coercively interrogating, issuing disciplinary warnings to and threatening Arnis Borgs with unspecified reprisals for discussing wage information and by promulgating a rule prohibiting employees from discussing such information with other employees.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent did not engage in the unfair labor practices alleged in the consolidated complaint not specifically found herein.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended [7]

ORDER

The Respondent, Epilepsy Foundation of Northeast Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning concerted activity protected by the Act.

(b) Issuing disciplinary warnings to employees for disclosing or discussing their wages with other employees.

(c) Threatening employees with reprisals for disclosing or discussing their wages with other employees.

(d) Maintaining a rule prohibiting employees from disclosing or discussing their wages with other employees.

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[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its policy prohibiting employees from discussing their wages with other employees.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings issued to Arnis Borgs and notify him in writing that this has been done and that the warnings will not be used against him in any way.

(c) Within 14 days after service by the Region, post at its facility in Cleveland, Ohio, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense,

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[8] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant To a Judgment of the United States Court Of Appeals Enforcing An Order of the National Labor Relations Board."

a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 10, 1996.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn cerification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found herein.

Dated, Washington, D.C. January 2, 1998

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT coercively question our employees about their concerted protected activities.

WE WILL NOT issue warnings to and/or threaten our employees with reprisals for discussing their wages with other employees.

WE WILL NOT maintain or enforce a policy prohibiting our employees from discussing their wages with other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL rescind the policy prohibiting our employees from discussing their wages with other employees.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings issued to Arnis Borgs and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the warnings will not be used against him in any way.

EPILEPSY FOUNDATION OF NORTHEAST OHIO

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Dec 3, 2001]

No. 00-1332

EPILEPSY FOUNDATION OF NORTHEAST OHIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

JUDGMENT

Before: EDWARDS, ROGERS, and TATEL, *Circuit Judges.*

THIS CAUSE came to be heard upon a petition filed by Epilepsy Foundation of Northeast Ohio to review an order of the National Labor Relations Board in Board Case Nos. 8-CA-28169 and 8-CA-28264, issued on July 10, 2000, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on October 2, 2001, and has considered the briefs and transcript of record filed in this cause. On November 2, 2001, the Court, being fully advised of the premises, handed down its opinion granting in part and denying in part enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the Petitioner, Epilepsy Foundation of Northeast Ohio, Cleveland, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning concerted activity protected by the National Labor Relations Act ("the Act").

(b) Issuing disciplinary warnings to employees for disclosing or discussing their wages with other employees.

(c) Threatening employees with reprisals for disclosing or discussing their wages with other employees.

(d) Maintaining a rule prohibiting employees from disclosing or discussing their wages with other employees.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its policy prohibiting employees from discussing their wages with other employees.

(b) Within 14 days after service by the Region, post at its facility in Cleveland, Ohio, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 8 of the National Labor Relations Board (Cleveland, Ohio), after being signed by the Petitioner's authorized representative, shall be posted by the Petitioner immediately upon receipt and maintained for 60 consecutive days in conspicuous places,

including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Petitioner to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Petitioner has gone out of business or closed down the facility involved in these proceedings, the Petitioner shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Petitioner at any time since December 28, 1995.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Petitioner has taken to comply.

IT IS FURTHER ORDERED that each party shall bear its own costs.

/s/ Edwards
EDWARDS
Circuit Judge, United States
Court of Appeals for the
District of Columbia Circuit

/s/ Rogers
ROGERS
Circuit Judge, United States
Court of Appeals for the
District of Columbia Circuit

/s/ Tatel
TATEL
Circuit Judge, United States
Court of Appeals for the
District of Columbia Circuit

APPENDIX

NOTICE TO EMPLOYEES POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate employees concerning their concerted protected activities.

WE WILL NOT issue disciplinary warnings to employees for disclosing or discussing their wages with other employees.

WE WILL NOT threaten employees with reprisals for disclosing or discussing their wages with other employees.

WE WILL NOT maintain a rule prohibiting employees from disclosing or discussing their wages with other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind our policy prohibiting employees from discussing their wages with other employees.

EPILEPSY FOUNDATION OF NORTHEAST OHIO

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Dec. 3, 2001]

No. 00-1332

EPILEPSY FOUNDATION OF NORTHEAST OHIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

September Term, 2001

Before: EDWARDS, ROGERS and TATEL, *Circuit Judges*.

ORDER

Upon consideration of the proposed judgment submitted by respondent, it is

ORDERED that the proposed judgment submitted by respondent be approved and is hereby adopted as the judgment of the court replacing the judgment filed herein on November 2, 2001.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Michael C. McGrail
MICHAEL C. MCGRAIL
Deputy Clerk

Supreme Court, U.S.
FILED
MAY 6 2002
OFFICE OF THE CLERK

No. 01-1292

In the Supreme Court of the United States

EPILEPSY FOUNDATION OF NORTHEAST OHIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals properly declined to enforce the Board's order against petitioner as resting on an erroneous retroactive application of a new interpretation of Section 7 of the National Labor Relations Act, 29 U.S.C. 157.

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In the Supreme Court of the United States

No. 01-1292

EPILEPSY FOUNDATION OF NORTHEAST OHIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 268 F.3d 1095. The decision and order of the National Labor Relations Board (Pet. App. 19a-95a) and the decision of the administrative law judge (Pet. App. 96a-122a) are reported at 331 N.L.R.B. No. 92.

JURISDICTION

The initial judgment of the court of appeals (Pet. App. 127a) was entered on November 2, 2001. A second judgment of the court of appeals (Pet. App. 123a-126a, 127a) was entered on December 3, 2001, replacing the

initial judgment. On January 24, 2002, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 4, 2002, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act (Act), 29 U.S.C. 157, guarantees employees the right to engage in "concerted activities for the purpose of * * * mutual aid or protection." In *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), this Court held, in agreement with the National Labor Relations Board (Board), that Section 7 of the Act "creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline." *Id.* at 256. The Court therefore upheld the Board's conclusion that an employer violates Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by conducting such an "investigatory" interview after denying an employee's request that his union representative be present at the interview. 420 U.S. at 252.[1]

Weingarten itself involved a unionized employer, and this Court therefore did not specifically address whether the right recognized in that case would apply to non-union employees as well. In *Materials Research Corp.*, 262 N.L.R.B. 1010 (1982), the Board held that "the right enunciated in *Weingarten* applies equally" to employees who are not represented by a union. *Id.* at 1016. Thus, the Board concluded that a non-union

[1] Section 8(a)(1), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, 29 U.S.C. 157.

employer violates Section 8(a)(1) by conducting an investigatory interview after refusing the employee's "request to have a coworker present to assist him" at the interview. *Ibid.* Subsequently, however, the Board overruled *Materials Research Corp.* and held that "*Weingarten* rights are inapplicable" where the employee is not represented by a "certified or recognized union." *Sears, Roebuck & Co.*, 274 N.L.R.B. 230, 230 (1985). The Board later recognized that Section 7 "might be amenable to other interpretations," but, for policy reasons, "decline[d] to return to the rule of *Materials Research.*" *E.I. DuPont de Nemours*, 289 N.L.R.B. 627, 628 (1988), petition for review denied *sub nom. Slaughter* v. *NLRB*, 876 F.2d 11 (3d Cir. 1989). See Pet. App. 6a-7a, 24a-25a.

2. Petitioner provides services to persons affected by epilepsy in northeastern Ohio. Pet. App. 20a, 97a. In 1993, petitioner was selected to conduct a research project concerning school-to-work transition for teenagers with epilepsy. *Id.* at 20a, 97a-98a. Arnis Borgs, an employment specialist, and Ashraful Hasan, a transition specialist, were hired to staff this project. *Id.* at 3a, 20a. On January 17, 1996, Borgs and Hasan sent Rick Berger, their supervisor, a memorandum discussing concerns about the project and stating that "your supervision of the program operations performed by [Borgs and Hasan] is not required." *Id.* at 3a-4a, 21a n.4. Borgs and Hasan also sent a copy of the January 17 memorandum to Christine Loehrke, petitioner's executive director. On January 29, 1996, Borgs and Hasan sent Loehrke a second memorandum that elaborated upon their earlier assertion that they no longer required Berger's supervision. *Id.* at 4a, 21a, 110a.

On February 1, 1996, Loehrke directed Borgs to meet with herself and Berger. Pet. App. 21a, 110a.

Borgs felt intimidated by the prospect of meeting alone with Loehrke and Berger because, at a meeting with Loehrke and Berger in December 1995, Borgs had received a reprimand for discussing salaries with other employees. *Id.* at 21a & n.5, 110a.[2] Borgs expressed those reservations to Loehrke and asked whether Hasan could also be present at the meeting. *Id.* at 4a, 21a-22a, 110a. Loehrke denied Borgs's request and, after Borgs continued to express his opposition to meeting alone with Loehrke and Berger, Loehrke told him to go home for the day. *Id.* at 4a, 22a, 110a. When Borgs returned to work the following day, Loehrke terminated him for refusing to meet with herself and Berger on February 1. *Ibid.*

3. a. Acting on a charge filed by Borgs, the Board's General Counsel issued a complaint alleging, in pertinent part, that petitioner violated Section 8(a)(1) of the Act by discharging Borgs for refusing to meet with Loehrke and Berger without Hasan on February 1, 1996. Pet. App. 96a, 114a-115a. After a hearing, the administrative law judge (ALJ) dismissed that allegation. *Id.* at 115a. Applying the Board's decision in *Du Pont*, the ALJ concluded that, although Borgs had reason to believe that the February 1, 1996, meeting could lead to disciplinary action, "*Weingarten* rights to representation in investigatory interviews are limited to 'employees in unionized workplaces who request the

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[2] The administrative law judge (ALJ) found that petitioner violated Section 8(a)(1) of the Act by coercively interrogating and reprimanding Borgs at the December 1995 meeting with Loehrke and Berger. Pet. App. 21a n.5, 102a-105a, 118a. Petitioner did not challenge the ALJ's findings before the Board (see *id.* at 21a n.5) or in the court of appeals (see *id.* at 124a), and petitioner does not contest those finding in this Court.

presence of a union representative.'" *Ibid.* (quoting *Du Pont*, 289 N.L.R.B. at 631).

b. A majority of the Board reversed the ALJ. Pet. App. 19a-95a. After an extensive review of the statutory and policy issues, the Board overruled *DuPont* and "return[ed] to the standard set forth in *Materials Research Corp.*," namely, that "the rule enunciated in *Weingarten* applies to employees not represented by a union as well as to those that are." *Id.* at 30a-31a. The Board explained, among other things, that, as in a unionized workplace, the right of unorganized employees to the presence of a coworker at an investigatory interview "greatly enhances the employees' opportunities to act in concert to address their concern 'that the employer does not initiate or continue a practice of imposing punishment unjustly.'" *Id.* at 26a (quoting *Weingarten*, 420 U.S at 260-261).

The Board further concluded that application of "the rule enunciated today to the facts of this case" would not work a "manifest injustice" under the retroactivity doctrine. Pet. App. 31a. The Board found "no evidence in the record even remotely suggesting that [petitioner] was relying on the state of Board law when it decided to take action against Borgs." *Ibid.* The Board also noted that petitioner's commission of independent, uncontested unfair labor practices showed that petitioner was "not receptive to the right of its employees to engage in protected concerted activity." *Id.* at 32a; see note 2, *supra*.

Accordingly, the Board found that petitioner violated Section 8(a)(1) of the Act by terminating Borgs "for insisting on having his coworker, Hasan, present at an investigatory interview." Pet. App. 31a; see *id.* at 32a n.14. As a remedy for that violation, the Board ordered

petitioner to reinstate Borgs with back pay. See *id.* at 32a n.14, 39a-40a.

4. The court of appeals granted in relevant part a petition for review filed by petitioner. Pet. App. 1a-18a. The court upheld, as a reasonable interpretation of Section 7, the Board's determination that "an employee's request for a coworker's presence at an investigatory interview is concerted action for mutual aid and protection." *Id.* at 9a; see *id.* at 3a. The court explained that "the presence of a coworker gives an employee a potential witness, advisor, and advocate in an adversarial situation, and, ideally, militates against the imposition of unjust discipline by the employer." *Id.* at 8a.

The court of appeals agreed with petitioner, however, that, "even if the NLRB's new interpretation of [Section] 7 is upheld," the Board's holding in this case "should not apply retroactively to impose damages for Borgs' discharge." Pet. App. 12a. The court concluded that "the Board erred in giving retroactive effect to its new interpretation of [Section] 7" because, in the circumstances of this case, "it would be a 'manifest injustice' to require [petitioner] to pay damages to an employee who, without legal right, flagrantly defied his employer's *lawful* instructions." *Id.* at 13a; see *id.* at 3a. The court of appeals explained (*id.* at 13a):

> At the time when this case arose, the Board's policy on the application of *Weingarten* rights was absolutely clear—employees not represented by a union could not invoke *Weingarten*. Thus, Borgs unquestionably had no right to have a coworker present at an interview with his supervisors. And the employer obviously acted in conformity with the prevailing law in denying Borgs' request to have a

> coworker present during his scheduled interview. Neither Borgs nor [petitioner] could have known for sure that the established law might change, so Borgs acted at his peril in defying his employer and [petitioner] acted with no apparent risk in following the law.

The court of appeals therefore "reverse[d] the Board's retroactive application of their new interpretation and the Board's finding[] that [petitioner] discharged Borgs * * * for engaging in protected activity." Pet. App. 18a; see *id.* at 123a-126a.

ARGUMENT

Petitioner contends (Pet. 10-18) that the Board's new construction of Section 7 of the Act in this case is based on a "misinterpretation" of that provision and raises "important constitutional concerns." However, review by this Court of petitioner's claim is not warranted. Petitioner is not aggrieved by the judgment of the court of appeals in this case; rather, in the court of appeals, petitioner prevailed on its contention that the Board's order is not entitled to enforcement in relevant respects. In any event, petitioner's abstract challenge to the Board's interpretation of Section 7 raises no issue warranting further review by this Court. The petition for certiorari should therefore be denied.

1. This Court has explained that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording relief and cannot appeal from it." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980). See *Public Serv. Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939) (successful party has no standing to appeal from decree denying injunction sought against it). In the present case, the court of appeals has afforded petitioner full

relief from the Board's order at issue. As explained above, petitioner sought review of a Board order directing that it reinstate employee Borgs with back pay, and the court of appeals declined to enforce the Board's order. In the court's view, the Board had erroneously applied its new interpretation of Section 7 retroactively to hold petitioner liable for an unfair labor practice in respect to its discharge of employee Borgs. See Pet. App. 12a-13a, 18a, 31a-32a & n.14, 39a-40a.[3] Accordingly, the judgment entered by the court of appeals enforced only certain unrelated portions of the Board's order, which petitioner did not contest in the court of appeals. See *id.* at 123a-126a; see also note 2, *supra*.

Moreover, subsequent to the issuance of its judgment, the court of appeals granted petitioner further relief by awarding it attorneys' fees and costs as a "prevailing party" under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). *Epilepsy Found. of Northeast Ohio* v. *NLRB*, No. 00-1332 (D.C. Cir. Mar. 29, 2002), slip op. 2.[4] Because the court of appeals has awarded petitioner full relief from the Board's order in this case (including an award of fees), the question

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[3] The Board has not sought this Court's review of the court of appeals' ruling on the retroactivity issue.

[4] A copy of the court of appeals' EAJA order has been lodged with the Clerk of this Court. In that order, the court of appeals noted that, while petitioner was a "prevailing party" for purposes of an EAJA award, the Board had prevailed on the issue of "[t]he Board's modification of the *Weingarten* doctrine." *Epilepsy Found.*, slip op. 3. The fact that the Board did prevail on one legal issue for EAJA purposes does not cast doubt on the conclusion that petitioner was not aggrieved by the court of appeals' underlying judgment, which refused to enforce the relief granted by the Board in relevant part.

whether the Board's new interpretation of Section 7 is reasonable is, in this case, entirely academic. See *New Orleans* v. *Emsheimer*, 181 U.S. 153, 154 (1901) (where decree upheld party's contention, that party "is in no position to complain that it is aggrieved by its own success"; such a decree "cannot be reversed at [the successful party's] instance because put on one of the grounds it urged rather than another").

Petitioner acknowledges (Pet. 6) that "the court of appeals relieved [petitioner] of any back pay liability for the discharge of Borgs," but suggests that, because it "continues to have employees," petitioner is "adversely affected by the Board's new rule." There is no merit to that suggestion. As petitioner concedes (*ibid.*), the fact that petitioner continues to employ unrepresented workers does not distinguish it from "all other nonunion employers." Petitioner is no more entitled than those other employers to an advisory opinion from this Court. Further review of the Board's new interpretation of Section 7, if necessary, should await a case in which a court of appeals has actually enforced the Board's application of that interpretation to a particular nonunion employer. See *California* v. *Rooney*, 483 U.S. 307, 314 (1987) (noting that it would be "most premature" for this Court to review an issue "which has never been the subject of an actual judgment").

2. In any event, there is no merit to petitioner's contention (Pet. 11) that the Board's current interpretation of Section 7 "cannot be reconciled with the plain language of the statute." Section 7 grants "[e]mployees" the right to engage in "concerted activities for the purpose of * * * mutual aid or protection." 29 U.S.C. 157. It is settled that an employee's effort to obtain the assistance of his union representative at a confrontation with his employer "clearly falls within the

literal wording of [Section] 7." *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975). So too does the Board's interpretation of Section 7 in this case. The rights afforded by Section 7 extend to all "[e]mployees," whether organized or not.[5] In the non-union setting, an employee's request for the assistance of a fellow employee at an investigatory interview is "concerted" activity "in its most basic and obvious form" because, in that scenario, "employees are seeking to act together." *Materials Research Corp.*, 262 N.L.R.B. 1010, 1015 (1982). Such concerted activity is also for the purpose of "mutual aid or protection," because "by such, all employees can be assured that they too can avail themselves of the assistance of a coworker in like circumstances." *Ibid.* See Pet. App. 25a-26a (Board concludes to return to position articulated in *Materials Research Corp.*).[6]

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[5] See, *e.g.*, *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962) (Section 7 protects walkout by group of unorganized employees to protest lack of heat in plant); see also *Materials Research Corp.*, 262 N.L.R.B. 1010, 1012 (1982) (noting "axiomatic" general principle that "the protection afforded by Section 7 does not vary depending on whether or not the employees involved are represented by a union"); Pet. App. 27a (Act "clearly protects the right of employees—whether unionized or not—to act in concert for mutual aid or protection").

[6] Although petitioner asserts (Pet. 11) that the Board's "repeated reexamination of this issue" has created "confusion," the relevant law was clear under the respective regimes of *Materials Research Corp.*, *Sears*, and *Du Pont*. In this case, the Board has made clear that the governing law is "the standard set forth in *Materials Research Corp.*" Pet. App. 31a. Moreover, "[a]n otherwise reasonable interpretation of [Section] 7 is not made legally infirm because the Board gives *renewed*, rather than new, meaning to a disputed statutory provision." *Id.* at 3a; see *Weingarten*, 420 U.S. at 265-266.

Petitioner asserts (Pet. 11) that employees cannot be engaged in "concerted" activity within the meaning of Section 7 unless they have "previously manifested shared interests." According to petitioner (*ibid.*), the Board's interpretation of Section 7 is based on an "irrebuttable presumption that all employees must have shared interests—whether they realize it or not." That (putative) presumption is improper, petitioner argues (Pet. 12), because, under the Act, employees "retain their own individual interests" unless they "declare [that] they have shared interests." There is no merit to petitioner's contentions, which are based on a mischaracterization of the Board's decision and on a misunderstanding of settled legal principles.

First, the Board created no "presumption" of any kind in this case. Rather, as discussed above, the Board simply, and reasonably, concluded that an unrepresented employee's request for a coworker's presence at an investigatory interview qualifies as "concerted" action for "mutual aid or protection" within the meaning of Section 7. Second, contrary to petitioner's suggestion, to be engaged in "concerted" activity, employees need not have "previously manifested shared interests," nor must employees "declare that they have shared interests." Section 7 does not require "an employee's activity and that of his fellow employees [to] combine with one another in any particular way." *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984). Moreover, it is settled that "concerted" activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action." *Meyers Indus., Inc.*, 281 N.L.R.B. 882, 887 (1986), enforced *sub nom. Prill* v. *NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988). An unrepresented employee is plainly seeking to

"initiate * * * group action" when he requests a coworker to accompany him to an investigatory interview conducted by the employer. 281 N.L.R.B. at 887.

There is also no merit to petitioner's contention (Pet. 12) that the Board's interpretation of Section 7 conflicts with "the realities of the workplace." That assertion is premised on petitioner's view (*ibid.*) that, where allegations of drug abuse or sexual harassment are involved, "only the interests of the individual employee will be at stake" during the investigative interview. As the present case itself illustrates (see Pet. App. 20a-22a), however, the use of investigatory interviews by employers is not limited to allegations of drug abuse or sexual harassment. See, *e.g.*, *Weingarten*, 420 U.S. at 254 (allegation that employee paid only $1 for a box of chicken that sold for $2.98); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 278 (1975) (employee's refusal to resume production). The Board's interpretation of Section 7 reflects the practical reality that, whatever the nature of the alleged offense, affording the accused employee "a potential witness, advisor, and advocate in an adversarial situation" reasonably "militates against the imposition of unjust discipline by the employer." Pet. App. 8a.

Moreover, contrary to petitioner's suggestion, the interests of the individual employee are not the only interests implicated even in drug abuse or sexual harassment investigations. Like other types of alleged misconduct, allegations of drug abuse and sexual harassment may be factually unfounded in a particular case; or, even if substantiated, the allegation may result in discipline that is unduly harsh under the circumstances. In either event, the employment interests of both the accused employee and his coworkers are implicated. For, "the rest of the employees have an interest

in helping the solely aggrieved individual, because next time it could be one of them that is the victim of the employer's arbitrary or unfair practices." *El Gran Combo de Puerto Rico* v. *NLRB*, 853 F.2d 996, 1005 n.4 (1st Cir. 1988).[7]

There is also no merit to petitioner's contention (Pet. 10, 13) that the court of appeals' decision in this case conflicts with *E.I. DuPont de Nemours & Co.* v. *NLRB*, 707 F.2d 1076 (9th Cir. 1983). In *DuPont*, the Ninth Circuit emphasized that it did not hold that, as a categorical matter, non-union employees have no right to the presence of a coworker at an investigatory interview. See *id.* at 1079 ("We repeat that we do not foreclose the possibility that a request for a fellow employee may be found concerted in the nonunion setting."). Rather, consistent with the court of appeals below, the *DuPont* court concluded that "a request for a fellow employee may be found concerted in the nonunion setting." *Ibid.*; see *id.* at 1078 (finding it "undoubtedly true" that, "just as [S]ection 7 is not limited to unionized employees, so the holding in *Weingarten*

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[7] Although petitioner suggests (Pet. 6) that the Board's decision in this case "will radically transform the manner in which nonunion employers carry out workplace investigations," that suggestion is unpersuasive. A nonunion employer is required to permit the presence of a coworker at an interview only if it is reasonable for the employee to believe that the interview might result in disciplinary action, and, in addition, only if the employee actually makes a request for the presence of a coworker. See Pet. App. 20a, 23a, 29a-30a. Moreover, the employer is free to reject the employee's request and to pursue the investigation without interviewing the employee (*id.* at 29a), thereby requiring the employee to choose between "having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that might be derived from one." *Weingarten*, 420 U.S. at 258.

cannot be so limited"). However, the *DuPont* court found, on the record before it, that the particular employee's request for "'any' coworker to witness his disciplinary proceeding" was not "concerted" activity. *Id.* at 1080. The court's ruling turned on the absence of evidence of "past activity involving [the employee] and other employees" or of an "indication that any other employee would respond to [the employee's] request." *Id.* at 1079. By contrast, the record here is replete with such evidence.[8] Accordingly, there is no reason to believe that the outcome of the present case would have been different in the Ninth Circuit.

3. Petitioner also contends (Pet. 15) that this Court's review is necessary in this case to determine whether the Board "can constitutionally place a content-based restriction on employer communications." Section 10(e) of the Act, 29 U.S.C. 160(e), provides that, absent

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[8] For example, prior to Borgs's request on February 1, 1996, that Hasan be present at his investigatory interview, Borgs had, in the late fall of 1995, discussed wages with other employees. Pet. App. 99a. The ALJ found that Borgs's discussions constituted protected, concerted activity under Section 7 and that petitioner had unlawfully interrogated and reprimanded Borgs about those discussions. *Id.* at 101a-102a; see, *e.g.*, *id.* at 105a-107a, 113a (Borgs engaged in protected, concerted activity throughout 1995 when seeking an increase in the mileage reimbursement rate on behalf of himself and other employees); *id.* at 32a-33a, 107a (Borgs and Hasan conducted series of "brown bag lunch" meetings between August and December 1995, where they and other employees discussed matters of "mutual concern"); *id.* at 20a-21a (Borgs and Hasan acted together in preparing January 1996 memoranda to Berger and Loehrke). The record in this case therefore demonstrates "past activity involving [Borgs] and other employees" and makes clear that Hasan "would respond to [Borgs's] request" for Hasan's assistance, had petitioner honored Borgs's request. *DuPont*, 707 F.2d at 1079.

extraordinary circumstances, "[n]o objection that has not been urged before the Board * * * shall be considered by the court." Petitioner does not challenge the court of appeals' conclusion that petitioner failed to raise its constitutional claim before the Board. See Pet. App. 11a-12a. Moreover, the court of appeals found that, although petitioner sought to raise its claim for the first time in its appellate brief, petitioner had demonstrated "no extraordinary circumstances" excusing its failure to raise the claim before the Board "in the first instance." *Id.* at 11a. Accordingly, as the court of appeals correctly ruled (*id.* at 11a-12a), petitioner is jurisdictionally barred by Section 10(e) from raising its constitutional claim before the courts. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982).

Contrary to petitioner's assertion (Pet. 18), this Court's review in this case is not necessary to determine whether the jurisdictional bar of Section 10(e) applies to constitutional claims. The text of Section 10(e) is unambiguous in mandating that "[n]o objection" not urged before the Board may be considered on judicial review of the Board's order. Moreover, this Court and the courts of appeals have consistently applied Section 10(e) to constitutional claims. See, *e.g.*, *International Ladies' Garment Workers' Union*, 420 U.S. at 281 n.3 (barring procedural due process claim); *Radisson Plaza Minneapolis* v. *NLRB*, 987 F.2d 1376, 1382-1383 (8th Cir. 1993) (barring similar claim); *Polynesian Cultural Ctr.* v. *NLRB*, 582 F.2d 467, 473 (9th Cir. 1978) (barring First Amendment claim). Cf. *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 896 n.7 (1984) (an "intervening, substantial change in controlling law" occasioned by a decision of this Court "qualifies as an 'extraordinary circumstanc[e]'" that permits considera-

tion of First Amendment claim). In interpreting the Act and applying it to the spectrum of labor-relations contexts, the Board regularly considers and resolves constitutional claims when timely raised.[9] It would therefore be particularly inappropriate for courts to "topple over" Board decisions "unless the administrative body not only has erred but has erred against [the] objection made at the time appropriate under its practice." *United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952).

In any event, petitioner's First Amendment claim is without merit. Although petitioner argues (Pet. 15) that the Board's decision in this case creates a "content-based restriction" on employer communication, the mere presence of a coworker at an investigatory interview does not restrict employer speech. Moreover, whether an employee is entitled to the presence of a coworker is not based on the *content* of the employer's speech, but rather, on the *effect* of that speech upon the employee (*i.e.*, whether it is objectively reasonable for an employee to believe that the interview may result in disciplinary action). Any arguable limitation on employer speech created by such a Board rule is consti-

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[9] See, *e.g.*, *In re, Wild Oats Markets, Inc.*, 336 N.L.R.B. No. 14 (Sept. 28, 2001), slip op. 4 (addressing claim that First Amendment protected lessee's communications with property manager concerning removal of picketers from parking lot); *Petrochem Insulation, Inc.*, 330 N.L.R.B. 47, 49-50 (1999) (interpreting Section 8(b)(4)(ii)(B) of the Act, 29 U.S.C. 158(b)(4)(ii)(B), to avoid First Amendment concerns with respect to unions' participation in state permitting proceedings), enforced, 240 F.3d 26 (D.C. Cir.), cert. denied, 122 S. Ct. 458 (2001); *Local Union 497, IBEW*, 275 N.L.R.B. 1290, 1291-1292 (1985) (addressing claim that compelled disclosure of union's membership list would infringe on members' First Amendment rights), enforced, 795 F.2d 836 (9th Cir. 1986).

tutionally permissible. See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617 (1969) ("[A]ny balancing of [employers' First Amendment rights and employees' Section 7 rights] must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."). Although petitioner asserts (Pet. 16) that the Board's rule is "unquestionably" content-based because it applies only to interviews where discipline may be at issue (rather than to all employer-employee exchanges), here, as in *Weingarten*, the Board could reasonably conclude that an employee's need for coworker assistance is not necessary in respect to non-disciplinary matters. See *Weingarten*, 420 U.S. at 257-258 (noting that the Board does not apply its rule in that case to "run-of-the-mill" shop floor matters such as "the giving of instructions or training or needed corrections of work techniques"). Moreover, because petitioner prevailed in this case (see point 1, *supra*), its claims, including its First Amendment claim, are not properly presented for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 01-1292

IN THE

Supreme Court of the United States

EPILEPSY FOUNDATION OF NORTHEAST OHIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

CORPORATE DISCLOSURE STATEMENT

Petitioner Epilepsy Foundation of Northeast Ohio is an unincorporated association with no parents or subsidiaries that have issued shares to the public.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION

Petitioner, Epilepsy Foundation of Northeast Ohio (the "Foundation"), respectfully submits this reply to the brief filed on behalf of the respondent National Labor Relations Board ("Board") in opposition to the Foundation's petition for a writ of certiorari.

I. DENIAL OF THE PETITION WILL UNNECESSARILY PROLONG THE CONFLICT AMONG THE APPELLATE COURTS

The Board attempts to circumvent the conflict between the decision below and the decision of the Ninth Circuit in *E. I. du Pont de Nemours and Co. v. NLRB*, 707 F.2d 1076 (9th Cir. 1983), by observing that the Ninth Circuit "did not hold that, as a categorical matter, non-union employees have

no right to the presence of a coworker at an investigatory interview." Opp. at 13. The Ninth Circuit allowed that it was conceivable that a co-worker's representation of a nonunion employee at a disciplinary interview could constitute concerted activity for mutual aid or protection if there were "a showing that the requesting employee acts as part of a group." 707 F.2d at 1079. The Board then suggests that because the record in the instant case allegedly is "replete" with evidence that Borgs engaged in concerted activity prior to his disciplinary interview, the D.C. Circuit's holding is indistinguishable from the Ninth Circuit's holding. Opp. at 14.

Studiously unacknowledged by the Board is the categorical nature of the rule adopted by the Board and affirmed by the D.C. Circuit in the present case. Nowhere in the Board's opinion below is there any indication that the Board considered the other activity of Borgs in concluding that Borgs was entitled to a representative. Quite to the contrary, the Board promulgated a blanket rule extending *Weingarten* rights to all nonunion workplaces regardless of the presence of prior group activity. App. 23a-24a.

Thus, the Ninth Circuit held that there is no absolute right to a co-worker representative in nonunion workplaces, whereas the D.C. Circuit held there is such an absolute right. That the Ninth Circuit speculated there could be occasions when prior group activity might bring co-worker representation at a disciplinary interview within the ambit of Section 7 does not eliminate this palpable conflict. "Occasionally" is not equivalent to "always."

Not unexpectedly, the Board cannot sustain the pretense of "no conflict" throughout its brief. The Board trips over its own feet. Arguing against the Foundation's contention that the Board has created an irrebuttable presumption that all employees have collective interests, the Board asserts that no

such presumption is required to conclude that co-worker representation at a disciplinary interview constitutes Section 7 activity. According to the Board, an unrepresented employee necessarily seeks to initiate group action "when he requests a coworker to accompany him to an investigatory interview conducted by the employer." Opp. at 11-12. This is precisely the proposition rejected by the Ninth Circuit. *E. I. du Pont de Nemours*, 707 F.2d at 1079 (the possibility that an employee's request for a representative might be incipient group activity is "wholly speculative").

There is already a well-defined conflict among the appellate courts on the statutory question at issue. The Ninth Circuit's denial of *Weingarten* rights to nonunion employees stands in sharp contrast to the Third Circuit's and the D.C. Circuit's approval of a *per se* rule guaranteeing all nonunion employees the right to a representative regardless of prior concerted activity. *See Slaughter v. NLRB*, 876 F.2d 11 (3d Cir. 1989) (discussing history of litigation on this issue in the Third Circuit). There is no need to wait to hear from additional appellate courts, especially given that this question has already troubled the Board and the courts for twenty years.

II. DENIAL OF THE PETITION WILL LEAVE UNRESOLVED IMPORTANT STATUTORY AND CONSTITUTIONAL QUESTIONS

The Board minimizes the significance of its own indecision on the underlying statutory question by denying that its constant course changes have caused confusion among employers and employees. The Board unashamedly asserts that there is no confusion about the proper interpretation of Section 7 because "the relevant law was clear under the respective regimes of *Materials Research Corp.*, *Sears* and *Du Pont*" and now, of course, *Epilepsy Foundation*. Opp. at 10 n.6. The Foundation agrees with the Board that there have

been four different and irreconcilable interpretations[1] of Section 7 within a twenty year period, but draws a different conclusion from this history. The Foundation submits that this vacillation by the Board with respect to its interpretation of a core provision of the NLRA emphasizes, rather than diminishes, the importance of the issues presented for resolution by this Court. Two decades of confusion are enough.

With respect to the constitutional question, the Board argues that review is not warranted because its rule does not impose a content-based restriction on employer speech, but rather restricts employer speech based on "the *effect* of that speech upon the employee (*i.e.,* whether it is objectively reasonable for an employee to believe that the interview may result in disciplinary action)." Opp. at 16. The Board's argument reveals a gross misunderstanding of this Court's First Amendment jurisprudence.[2]

To begin, for an employee to have an "objectively reasonable" belief that he might be disciplined, the content of the employer's speech must refer to discipline. Discussions confined to sick leave, promotions or wage increases cannot trigger an "objectively reasonable" concern over discipline. Moreover, this Court has held that restrictions "that focus on the direct impact of speech on its audience" are unquestionably content-based restrictions. *Boos v. Barry,* 485 U.S. 312, 321 (1988); s*ee also Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 574 (2001) (Thomas, J., concurring) (regulations concerned with primary effect of speech are content-based regulations). The Board's rule by its own terms distinguishes between discipline-related speech and all other employer speech. This is a content-based rule. *See Turner*

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[1] Five, counting the rule in effect prior to *Materials Research Corp.*

[2] Indirectly, of course, this supports the Foundation's position that the courts have more expertise on constitutional issues than does the Board.

Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994) (laws that by their terms distinguish favored speech from unfavored speech on the basis of the ideas or views expressed are content-based). The Board should not be allowed to evade review of this significant and constitutionally infirm expansion of its authority over employer speech.

III. THE FOUNDATION IS AGGRIEVED BY THE JUDGMENT OF THE COURT OF APPEALS

Following the adage that if one cannot argue substance, argue procedure, the Board contends that review of the questions presented by the Foundation is not warranted because the Foundation prevailed before the court of appeals. There is no merit to this contention.

The plain language of the court's opinion demonstrates that the Foundation lost on the principal issue decided by the court, namely whether nonunion employees are entitled to *Weingarten* rights. App. 6a-12a. Moreover, the conclusion of the court's opinion explicitly states that the court will "deny in part and grant in part the [Foundation's] petition for review." The court also states that it will "grant the cross-application for enforcement for the Board's decision to extend *Weingarten* under § 7 of the Act to nonunion employees." App. 18a. Given the court's judgment, which expressly denies the Foundation some of the relief it sought, the Board cannot credibly maintain that "the court of appeals has afforded petitioner full relief from the Board's order at issue." Opp. at 7-8. Merely because the court tempered its ruling by declining to order the Foundation to reinstate Borgs or provide him with back pay does not magically transform a partial loss into an unappealable total victory. This Court has unambiguously and unanimously held that a party is "aggrieved" and can appeal a decision when it has been denied part of the remedy requested. *Forney v. Apfel*, 524 U.S. 266, 271 (1998).

Curiously, the Board references the court's attorneys' fee award to support its claim that the Foundation is not aggrieved. Opp. at 8. The court's order on the Foundation's application for fees and costs flatly contradicts the Board's contention that the Foundation is not aggrieved.[3] Precisely because the Foundation lost on the *Weingarten* issue, the court reduced by one-half the fees awarded the Foundation. In language that leaves no room for doubt as to whether the Foundation is aggrieved, the court stated:

> The Board's modification of the *Weingarten* doctrine, however, was by far the most important issue in the case and the Board prevailed on that issue. The Foundation offers no basis upon which to allocate fees between the two lesser issues—retroactivity and substantial evidence—and the main issue in the case. In light of this failure, we allocate 50% of the submitted fees to the challenge brought against the Board's expansion of the *Weingarten* doctrine and reduce the total fee award accordingly.

Epilepsy Found. Of Northeast Ohio v. NLRB, No. 00-1332, slip op. at 3 (D.C. Cir. Mar. 29, 2002).

The fact that the court of appeals denied the Foundation the fees it requested because "the Board prevailed" on what "was by far the most important issue in the case," demonstrates that the Foundation is an aggrieved party even under the precedent cited by the Board. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332-33, 336-40 (1980) (plaintiff's individual interest in class certification question, resolution of which could affect sharing of costs of litigation among class members, sufficient to permit plaintiff an appeal from court's ruling that otherwise granted plaintiff complete relief); *see also Berthold Types Ltd. v. Adobe Sys., Inc.*, 242 F.3d 772,

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[3] The court's order on the Foundation's Motion for Attorneys' Fees and Costs Pursuant to 28 U.S.C. § 2412 has been lodged with the Clerk of this Court.

776 (7th Cir. 2001) ("Adobe is out of pocket the amount it has paid its attorneys; this concrete loss means that it is aggrieved by the outcome and entitled to appeal").

The Foundation has suffered "an adverse decision on a litigated issue" and continues to maintain a tangible "interest in the outcome of that issue." *Deposit Guar. Nat'l Bank*, 445 U.S. at 335-36 n.7. Nothing more is required to show that it is aggrieved by the judgment of the court of appeals.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

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